REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 155 OF 2013

JIMMY MUTUKU MUSOMBA……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An appeal arising out of the conviction and sentence of Hon. D.G. Karani. PM delivered on 13th May 2013 in Sexual Offences Act Case No. 7 of 2013 in the Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appellant was convicted and sentenced to serve 20 years imprisonment for the offence of defilement , contrary to section 8(1) (3) of the Sexual Offences Act. The particulars of the offence were that on 9th May 2013 at within Machakos County, the Appellant intentionally and unlawfully did an act which caused penetration with his organ (penis) into genital organ (vagina) of HMK, a child aged 15 years.

He was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on 9th May 2013 within Machakos County, the Appellant intentionally by use of his genital organ namely penis caused contact to the genital organ namely vagina of H M K, a child aged 15 years.

The Appellant was arraigned in court on 13th May 2013 when he pleaded guilty to the charges. The trial court then convicted the Appellant of the offence on his own plea of guilty, and sentenced him to serve twenty (20) years imprisonment.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Amended Grounds of Appeal that he availed to the Court. In summary the Appellant alleges that the consequences of pleading guilty to the charge were not explained to him thus the plea was not voluntary; the magistrate did not make an inquiry behind his admission to the charge; his detention at the police station from 10.5.2013 to 13.5.2013 was unlawful and had contributed to his plea of guilt; the facts of the case as read to him did not indicate the name of the complainant hence it was invalid.

The Appellant availed written submissions to the Court, wherein he urged that his detention in police custody for more than 24 hours after his arrest was contrary to Article 49(1) (f) of the Constitution. He also argued that his plea was not unequivocal. And relied on the decisions in **Ngugi vs Republic, (1987) KLR 98, Adan vs Republic, (1973) EA 45, Olel vs R, (1989) KLR 444** and **Boit vs R, (2002) 1KLR 815**.

He submitted that the trial magistrate ought to have ordered for his mental examination report prior to accepting his plea of guilt. Further, that failure or omission to indicate the name of the minor or her parent's name vitiated his plea and rendered the facts invalid. He stated that the irregularity cannot be cured under section 282 of the Criminal Procedure Code. He relied on the case of **Ndede vs R(1991) KLR 567**.

Gitonga Muranga, the learned prosecution counsel, filed submissions dated 30th May 2014 wherein he opposed the appeal stating that the Appellant had been convicted and sentenced on his own plea of guilt. It was pointed out that section 348 of the Criminal Procedure Code states that no appeal shall be allowed in the case of an accused person who pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence. Therefore, that the Appellant's attempt to raise grounds under Article 25(1) of the Constitution does not hold ground. Finally, that the Appellant had not disclosed any new material that would lead the court to reach a different opinion or order a re-trial.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I have considered the arguments by the Appellant and Prosecution, and I am alive to the provisions in section 348 of the Criminal Procedure Code that no appeal shall be allowed in the case of an accused person who pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence. I therefore find that the issues for determination by the court are firstly, whether the plea of guilty by the Appellant was unequivocal; secondly, whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute; and lastly, whether the said sentence is amenable to reduction and /or variation.

The procedure to be applied in taking a plea of guilty were well enunciated in the case *of* **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

> ***"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***
>
> ***(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.***
>
> ***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***
>
> ***(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***
>
> ***(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."***

The procedure as laid out in ***Adan vs Republic*** (**supra**) is also provided for under *section 207* of the Criminal Procedure Code which 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.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

Coming to the present appeal, the record of the trial Court shows that after the charge was explained to the Appellant he replied and the proceedings continued as follows:

> **" On 9.5.2013 at Ngomano village the accused intentionally and unlawfully defiled the minor aged 15 years of age. She had been chased away from home and met with the accused who offered her accommodation. He took the opportunity and defiled the minor. Her parents started looking for her and found her with the accused. The matter was reported at Donyo Sabuk Police Station and accused was arrested. She was treated at Donyo Sabuk Health Centre and I have the treatment notes and P3 – p. Exhibit 1 and 2. Upon completion of investigations the accused was arrested and charged. The complainant was born on 21/4/1998. I have the child immunization card-P. Exhibit 3"**

The applicable law requires that the prosecution outlines the facts upon which the charge is founded after a plea of guilty is entered. I note in this regard that the prosecution stated that the Appellant "defiled the minor" in the facts that were given in the trial Court. Defilement and to defile is the offence as stated in law and in the charge sheet, and is a technical and legal term. The facts giving rise to that offence and showing that the essential ingredients of that offence, which is penetration, took place, needed to have been given by the prosecution, and explained to the Appellant in a language and manner that he understood, for him to have an opportunity to admit or challenge the same.

In addition other technical and legal terms such as intentionally and unlawfully were also used in the statement of facts. Lastly, I also agree with the Appellant's arguments that the facts as narrated do not disclose the identity of the minor alleged to have been defiled, and if indeed it is the child named in the charge sheet. I therefore find that the Appellant's plea of guilty was not unequivocal to this extent, and the sentence imposed upon him was also unlawful to this extent and not merited.

I accordingly allow the Appellant's appeal and quash his conviction for the offence of defilement contrary to section 8(1) and (3) of the Sexual Offences Act. I also set aside the sentence imposed upon him for the said conviction and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 20TH DAY OF JULY 2016.

P. NYAMWEYA

JUDGE