



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 62 OF 2014

HENRY KERAGE NYACHOTI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Henry Kerage Nyachoti** was charged of defilement of a child below eleven year of age contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. The particulars were that on the 24th day of August, 2011 at [Particulars Withheld] in Kisii south within Kisii County intentionally and unlawfully penetrated the vagina of **V K G** a girl aged 3 years using his genital organ, namely, a penis.

2. In the alternative charge **Henry Kerage Nyachoti** was charged of indecent act, with the child, contrary to section 11(1) of Sexual Offences Act, No. 3 of 2006. The particulars were that on the 24th day of August, 2011 at [Particulars Withheld] in Kisii South District within Kisii County did commit an indecent act with **V K G** a girl aged 3 years by rubbing his penis against her vagina.

3. The substance of the charge and every element of it (has been) was stated by this court to the accused in Ekegusii who being asked whether he admits or denies the truth of every element of the charge replies in Ekegusii.

Court: Accused is cautioned about seriousness of the charge and sentence.

Main Charge: it is true.

Alternative charge: it is true.

Court: plea of guilty entered.

4. Facts

The accused person and the complainant are neighbours. On 24th August, 2011 the parents of **V K** went to their shamba not far from home leaving **V** and her sister **B** playing. Then they saw many people at their home. **G**, mother of the complainant went to the home and got information from the crowd amongst them **A** the child's aunt that the child had been defiled by the accused who then ran away. The girl could not stop and was bleeding from her private parts. They rushed her to Kisii level 5 hospital where she was treated and admitted. The matter was reported to Gesonso police station and to vigilantes. On 14/10/2011 vigilantes among them Reuben Onduso and George Mokuia took the accused to Gesonso

police station.

Court: The accused is found guilty and convicted on his own plea of guilty.

Sentence: Accused to serve life imprisonment. R/A 14days explained.

5. The accused filed a criminal appeal, being criminal appeal no. 241 of 2011. The same was admitted for hearing before a single judge on 9th July, 2012.

6. However while the appeal was pending 'hearing, the appellant filed a petition, No.62 of 2014. On 18th December, 2014, Nyawencha for the appellant stunned the court by abandoning appealing No. 241 of 2011 and now decided to prosecute the petition.

7. The petitioner's submission

I rely on petition itself which is self-EXPLANATORY. At para. 3 of the petition, the court record indicates that Momanyi was the one on record for the petitioner whereas the petitioner says that the real advocate for him was G. Masese who has sworn an affidavit to that effect. So I submit that recording of the trial magistrate is (grossly) incorrect.

8. The medical report of the petitioner shows that she went to the Hospital twice, on the same date at 11.51.06hours and at 19.17.9hours on 25th August, 2011. I submit that is not true. It further shows that the rights were not explained to her.

9. From this disparities, it shows that the trial was not conducted in a fair manner. Thus I beg this court to quash the conviction and sentence as it was a mistrial the court should order for a new trial before a different magistrate.

10. The respondent's submissions

1) It is my submission that the accused was represented by counsel. Although the typed record indicates it was Momanyi, but the petitioner says it is G. Masese.

2) I submit that by a mere fact that the names differ does not infringe on the petitioner's rights.

3) The trial magistrate could not inform the accused of his rights when he had counsel on record all the time.

4) I submit that when the charges were read, it is clearly indicated by the magistrate that the accused was cautioned about the seriousness of the charge and the sentence.

5) I submit that the petitioner is unable to name a right that was infringed.

6) I submit that the accused proceeded to plead guilty after that warning, in the presence of his counsel.

7) That PW3 form was produced as an exhibit which exhibit the accused and his advocate had the opportunity of raising an objection to that they are now raising. But they did not.

8) I submit that before the accused was asked to plead, he said: "Have understood the facts, they are true. The accused cannot name any of his rights that were infringed.

9) When the accused pleaded guilty all the procedure were followed.

10) The appeal has been abandoned. This court will be convinced to order a re-trial on an appeal

where the accused adduced evidence would have been re-evaluated by this court.

11) None of the grounds for this petition have been explained.

12) The visit to the hospital twice, does not infringes her rights. Nothing prevents the complainant to visit the hospital as main times as she requires.

13) The law is very clear on conviction on plea of guilty, an appeal can only lie on the extent or legality of the sentence.

11. Therefore this petition disguised as an appeal should not be allowed. I ask that the petition be dismissed and conviction and sentence be upheld.

12. Conclusion

Counsel has not helped his client by bringing this petition. Mistake in names may have arisen from deciphering the learned magistrate' handwriting, Masese appeared as Momanyi. This does not vitiate both the conviction and the sentence.

13. Accordingly, the petitioner herein be and is hereby dismissed. There is right of appeal.

Dated and delivered at KISII this 20th day of February, 2015.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Nyawencha for the appellant

Otieno for the respondent

Edwin Mongare Court Clerk.