REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT MERU

HCRA 239 OF 2010

S M K ………………......……………APPLICANT

VRS

REPUBLIC ………..……………… RESPONDENT

J U D G E M E N T

S M K was convicted on his own plea of guilty for the offence of incest contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006 by the Senior Resident Magistrate, Nkubu and was sentenced to life imprisonment. The Appellant challenges both conviction and sentence on the following grounds:

> ***1.That the court erred when it failed to consider the law under Section 72 (3) of the Constitution was flouted;***
>
> ***2.That the Prosecution failed to summon vital witnesses;***
>
> ***3.That the Prosecution failed to adduce any medical evidence;***
>
> ***4.That the court erred by failing to consider the Appellant's defence;***
>
> ***5.That there existed a grudge between him and PW1 and 2 on the other hand.***

He therefore urged the court to quash the conviction and set aside the sentence. Before the hearing, the Appellant requested production of the occurrence book (OB) for Subuiga Police Station for 18/7/2010. The same was produced by CIP Sammy Mwangi, Officer Commanding Station (OCS) Subuiga Police Station who told the court that he had gone through the OB of that date and found no entry in respect of the Appellant on that date. He left the OB with the court for the court to peruse. In his submissions, the Appellant seemed to be making his defence which was to the effect that the child (complainant) had been abducted and that he reported to Subuiga Police Station and despite the fact that he took the letter for the people concerned to be arrested, he was arrested instead.

The Appeal was opposed. Mr. Mulochi, Learned Counsel for the State argued that the Appellant was convicted in his own plea of guilty and can only appeal on the sentence. He argued that since the victim was under the age of 18 years, the Appellant was liable to be sentenced to life imprisonment. Counsel further argued that the grounds he raises now were raised in his mitigation and the trial court must have considered them and that the sentence is lawful and the appeal should be dismissed.

This being the first appeal, my duty is to re-evaluate the evidence afresh and arrive at my own independent determination. Although the Prosecution had called four witnesses who attended the court on 22/12/2000, when the case came up for hearing, the appellant applied to the court that he wished to

change his plea. The court recorded the Appellant's application and warned the Appellant that the offence was serious and that the likely sentence was life imprisonment. It seems the Appellant persisted in the change of plea and the charge was read to him afresh to which he replied that he committed the offence. The facts were read to the Appellant and he confirmed that they were correct. He was convicted, on his own plea, was said to be a first offender, gave his mitigation pleading for lenience because he is the only parent but the court went ahead to sentence the Appellant to life imprisonment.

I have perused the OB for 18/7/2010 Subuiga Police Station and I find nothing contained therein that is relevant to this case. Besides, the Appellant is trying to raise a defence which he did not give in the lower court having pleaded guilty to the offence. As a general rule, where an accused person has been convicted on his own plea, he can only question the extent or legality of the sentence by dint of Section 348 of the Criminal Procedure Code. The said Section read as follows:

> ***"348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."***

However, there are exceptions to the rule, so that if the plea was equivocal; or where the plea was to a charge unknown in law or where it infringed the principle of legality or where the rule against double jeopardy was breached. The Appellant never brought himself within the above exceptions. I find no evidence on record to demonstrate that the plea was equivocal. The court finds that the conviction is safe and is hereby confirmed. For the above reasons, the appeal against conviction is dismissed.

The Sexual Offences Act is a statute of strict liability and even though the Appellant pleaded guilty, the sentence provided under Section 20 (1) of Sexual Offences Act, is life imprisonment and the trial court acted within the law. The appeal on sentence also dismissed.

The Appellant raised other grounds; that vital witnesses were not called; that medical evidence was not adduced and that his defence was not considered. The Appellant having pleaded guilty, the above grounds are totally misplaced because the case did not go to full trial having pleaded guilty.

As to the complaint that Section 72 (3) of the Constitution (retired) was not complied with; the said Section provided that an arrested person had to be arraigned before a court of law within 48 hours unless it was a capital offence. The Appellant is therefore alleging breach of his constitutional rights. If at all his rights were breached, which he has not specifically explained to the court, then he should have raised it once he was arraigned in the trial court, to allow the police officers who arrested him to respond to the said allegations. Besides, the said allegation of breach cannot vitiate the charge that the Appellant faces. A breach under the Constitution attracts a civil claim for compensation under Section 72 (6) of the retired Constitution.

Having considered all the above grounds, I find no merit in the appeal and it is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF JUNE, 2015.

R. P. V. WENDOH

JUDGE

PRESENT

Mr. Mulochi for State

Faith, Court Assistant

Appellant, Present