REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.44 OF 2012

(Appeal from original conviction and sentence by Hon. J. M. Kituku in Garsen SRM Cr. No,107 of 2012)

FELIX KATANA CHARO ....APPEALLANT

VRS

REPUBLIC .... RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to section 8 (1) and 8 (3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the appellant on diverse dates between 27th February 2012 and 26th April 2012 at Delta District in Tana River County willfully and unlawfully caused his penis to penetrate into the vagina of R M, a girl aged 15 years.

The appellant pleaded guilty and was sentenced to serve twenty (20) years imprisonment. The grounds of appeal are that he was not given ample time to reflect on the plea, that he was not given sufficient details of the charge, that the age of the complainant was not proved and that the medical report did not support the charge.

The appellant contends in his written submissions that he was not informed about the consequences of pleading guilty. Had he been notified of the consequences, he would have not pleaded guilty. The plea did not meet the requirements of Articles 50 (2) (b) of the Constitution which requires an accused person to be informed of the charge with sufficient details. It is also submitted that there was no medical evidence in relation to the age of the victim.

The State opposed the appeal. Mr. Nyongesa, prosecuting counsel, submitted that the plea was unequivocal. The facts were read over to the accused and he pleaded guilty. He was allowed to mitigate. The ingredients of defilement proved. Counsel further submitted that if the plea is found not to have been unequivocal, then the court should order a retrial.

The appellant was arraigned before the Garsen court on 27/4/2012. the charge was read over to him in Kiswahili and he stated that it was true. The prosecutor read over the facts to the accused. The facts of the case were that on 25th April 2012, Administration Police Officers at Minjila area got a tip off that the appellant was living with an under age lady near the banks of Tana River. The police invaded the appellant's home and rescued the girl. The appellant informed the police that he had married the girl since February 2012. The girl's age was assessed and found to be 15 years old. She was also pregnant. The appellant informed the court that the facts were true.

It is the appellant's position that he had married the complainant. According to him, he married the complainant in February 2012 and were living as husband and wife. The social inquiry report shows that the complainant had dropped out of school. The appellant informed the court that he was 24 years old. It is contended that the plea was not unequivocal as the information lacked details and that the appellant was not informed of the consequences of pleading guilty.

It is clear from the trial court's record that the appellant was not informed by the court about the consequences of pleading guilty. The sentence is quite severe and it is incumbent upon the trial magistrates to inform accused persons of the consequences of pleading guilty whenever the sentence to be

meted out is quite severe. According to the appellant, he had not committed any offence as what was stated in court was true. He had married the complainant who was not even in court. The appellant's position is that the complainant was his wife. It could be possible that the complainant did not inform the appellant about her age as she was not attending school. The social inquiry report shows that the two people met accidentally and were not known to each other.

Given the circumstances of this case, I do find that the plea was not unequivocal. The trial court ought to have entered a not guilty plea as the facts indicated that upon interrogation, the appellant informed the police that he had married the complainant. To the appellant, he pleaded guilty to the fact that he had married the complainant. I do find that the plea was not properly taken.

The alleged offence occurred between February and April 2012. It is now over three years from the date of the offence. Mr. Nyongesa urged the court to order a retrial. It is clear to me that the complainant presented herself as a girl ready to get married. She was not in school. I do find that she made the appellant believe that she was ready for marriage. Making an order for retrial would not be ideal in the circumstances. The social inquiry report shows that the two decided to elope and were living happily before the appellant was arrested. The complainant was pregnant and must have delivered by now. The circumstances of the case do not call for an order of retrial. The appellant is likely to benefit from the defence under section 8 (5) of the Sexual Offences Act.

In the end, I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 17th day of September, 2015.

SAID J. CHITEMBWE

JUDGE