REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.185 OF 2013

REPUBLIC ……...…….PROSECUTOR

VERSUS

CALLEB BIHONZO……..……..……ACCUSED

(Being an appeal from conviction and sentence in Butali SRM'S Cr. Case No.646 of 2013 in a judgment delivered by Hon. M.L Nabibya, Ag SRM on 25/09/2013)

J U D G M E N T

1. The appellant in this case, Caleb Bihonzo pleaded guilty to the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, No.3 of 2006. The particulars of the charge were that on the 21st day of September 2013 at *[particulars withheld]* in Kakamega North District of Kakamega County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of one L.K a child aged 14 years.

2. Upon conviction on his own plea, the appellant was sentenced to twenty (20) years imprisonment in accordance with the law. Being aggrieved by both conviction and sentence, the appellant has appealed to this Court vide the Petition of Appeal filed in Court on 11/10/2013. The 4 grounds of appeal are:-

1. THAT I was confused when the charges were read to me as I was not conversant with the court process hence did not understand the charge.

2. THAT the trial court erred both in law and fact by not warning me on the consequences of pleading guilty

3. THAT for the interest of justice I pray for a retrial to make me argue my case as I believe I will be exonerated from this crime if the full trial is ordered.

4. THAT the sentence meted was harsh.

3. The appellant's prayer is that the appeal be allowed, conviction quashed and a retrial to be conducted by any Court of competent jurisdiction be ordered.

4. At the hearing of the appeal, the appellant submitted that upon arrest, he was thoroughly beaten so that by the time he appeared in Court he had been forced to plead guilty. He asked this Court to allow his appeal quash, the conviction set aside the sentence and order a retrial.

5. The appeal was opposed by Mr. Oroni who appeared for the State/Respondent. Counsel submitted that the plea upon which the appellant was found guilty and convicted was unequivocal. He also submitted

that the sentence which was meted out to the appellant was a proper and lawful sentence under the law. Counsel urged this Court to dismiss the appeal.

6. This is a first appeal and as such this Court is under a duty to reconsider and evaluate the whole evidence with a view to deciding whether the conclusions of the learned trial Magistrate are well founded. See **Okeno –vs- Republic [1972] EA 32**.

7. In the instant case, the appellant was convicted on his own plea of guilty so the concern of this Court is whether the plea entered by the trial Court was unequivocal. The legal principles to be followed by a trial Court when entering a plea of guilty were set out in the case of **Adan –vs- Republic [1973] EA 445**. These principles are:-

> **a) 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.**
>
> **b) The accused's own words should be recorded and if they are an admission, a plea of guilty should be entered.**
>
> **c) 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.**
>
> **d) If the accused does not agree the facts or raises any question as to his guilt his reply must be recorded and change of plea entered.**
>
> **e) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.**

8. In the case of **Koech –vs- Republic [1968] EA 109**, it was held inter alia that, if an accused person admits an assertion of facts but proffers an explanation, the accused's statement should be treated as a plea "not Guilty" and the Prosecution be required to lead their evidence.

9. So how was the plea taken in this case? The appellant appeared before the trial Court on 25/09/2013. This was about 4 days from the date of the alleged offence. According to the record, the substance of the charge and every element thereof was stated to him by the Court in Kiswahili a language the appellant stated he understood. After the charge was read out to the appellant the appellant answered – Accused – "Ukweli" which words when translated into English mean "it is true".

10. Thereafter the Prosecution outlined the facts of the case in some considerable detail to which the appellant replied, "Ni ukweli" meaning "it is true". The Court then entered a plea of guilty and convicted him on his own plea. After the Prosecution gave its statement of the facts relevant to sentence together with the appellant's mitigation, the appellant was sentenced to 20 years imprisonment.

11. Can it be said here that the plea taken by the trial Court was unequivocal in the circumstances? The appellant alleges that he was misled into pleading guilty by the Police and members of the public who also beat him up before he was taken to Court. He also alleges that he pleaded guilty because of his unfamiliarity with the Court procedures. The appellant's complaints may be true or not true, because a convict will stop at nothing to get himself/herself free from the threat of a life of incarceration, but do the words it is "true" for admitting the charge and the facts amount to an unequivocal admission of charge and facts? Can it be said that the appellant in this case knew what he was pleading to?

12. It is my considered view that those words are not adequate to constitute a plea of guilty and further that the record does not show that the appellant understood the facts and knew what he was pleading to see **Baya –vs- Republic [1984] KLR 657**. In the case of **Boit –vs- Republic [2002] 1 KLR 814**, the Court held that before a Court enters a plea of guilty, especially in serious offences, the accused person should be made to understand the consequences of his plea of guilty. This Court is of the considered view that since sexual offences are strict offences where sentences are imposed by Statute without

affording the Court any discretion, then the Court taking plea in such a case needs to exercise caution by ensuring that the accused person fully understands the charge he is facing and the consequences of pleading guilty to any such offence. See the case of **Kisivi –vs- Republic [1991] KLR 125**.

13. In **Njuki –vs- Republic [1990] KLR 334**, the Court held that pleas recorded in such words as "I admit", or "I plead guilty" or "it is true" or "I accept" cannot be considered as unequivocal pleas.

14. In the instant case, the appellant simply said "it is true" in answer to both the charge and the facts. These words, without more do not convince me that the appellant fully understood the charge and pleaded guilty to every element of it.

15. For the above reasons, I do allow the appeal, quash the conviction and set aside the sentence of twenty (20) years imprisonment. Should this case be remitted for retrial as requested by the appellant? In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial, nor will a retrial necessarily be ordered where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame. The bottom line for ordering or not ordering a retrial depends on the merits of each case and an order for retrial should be made only where the interests of justice require it, and where the appellant shall not be prejudiced.

16. In the instant case, I am satisfied that a retrial would be in order. First and foremost, no prejudice would accrue to the appellant if the case goes back for retrial. The alleged offence was committed on 21/09/2013, which is about 2 years ago. I have no doubt in my mind that the witnesses required by the Prosecution would be traceable and available to testify. Secondly, the error which has led to the appeal being allowed was committed by the trial Court and not by the Prosecution. Thirdly, the offence with which the appellant was charged is a very serious one, and must have left indelible and unpleasant memories in the mind of the victim. In my considered view, justice demands that the case be fully heard so that the truth can be brought out. See **Kitsao –vs- Republic [2007] 1 EA 157 (CAK).**

17. In the premises, I order that this case shall be heard afresh at Butali SRM'S Court by a Court other than Hon. M.L. Nabibya who took the plea when the appellant appeared before that Court. To facilitate the retrial, the appellant shall be produced before the Court at Butali on 02/11/2015 for directions as to fresh hearing.

18. Orders accordingly.

Judgment, delivered, dated and signed in open Court at Kakamega this 27th day of October 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Present in person for Appellant

Mr. Omwenga (present) for Respondent

Mr. Okoit - Court Assistant