REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 100 OF 2014

NICHOLAS MBUVI MUTHUI …..... APPELLANT

V E R S U S

REPUBLIC …..... RESPONDENT

(From original conviction and sentence in criminal case No. 54 of 2014 of the Principal Magistrate's court at Kyuso E.W.Musyoka –R.M)

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 10th February 2014 in Kyuso District within Kitui County intentionally and unlawfully committed an act which caused the penetration of his penis into the vagina of KK a child aged 9 years. In the alternative, he was charged with indecent act contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally and unlawfully committed an indecent act by causing his penis to touch the

vagina of KK a child aged 9 years. He was also charged with a second count of being in possession of cannabis sativa (bhang) contrary to section 3 (1)(2)(a) of the Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994. The particulars of the offence were that on the same day and place was found in possession of cannabis sativa (bhang) to wit 200 grams valued at Kshs 400/= which was not in form of medical preparation.

The charges were read to him in court on 12th February 2014. He pleaded not guilty to count 1 and to the alternative charge. He however pleaded guilty to count II for possession of cannabis sativa. He was convicted of this offence and ordered to pay a fine of Kshs 10,000/= or in default to serve one year imprisonment.

With regard to count 1 and alternative count, the trial commenced and three witnesses testified. On the 5th of August 2014 however, the appellant asked that the charges be read to him afresh and he entered a plea of guilty. The prosecutor then informed the court that he was not able to summarize the facts as he did not have relevant documents. The matter was thus adjourned.

On the 12th of August 2014 the appellant again changed his plea to not guilty. A hearing date was thus fixed for 16th September 2014. On that date however a new prosecutor came into the picture who was not ready to proceed. The case was thus adjourned.

When the case came up for hearing the 28th of October 2014, the prosecutor stated that he had two witnesses present. The accused, however informed the court that he wanted to admit the charge. He then pleaded guilty, the facts were summarized by the prosecutor. He was consequently convicted and sentenced to serve life imprisonment.

He has now come to this court on appeal, having filed his grounds of appeal on 25th November 2014. Before the appeal was heard however, he filed amended grounds of appeal as well as written submissions. He relied on the amended grounds of appeal, which are as follows:-

1. The plea was equivocal.

2. That he was shocked and un easy during the hearing of the prosecution case.

3. That he never knew the intensity and consequences of the offence.

4. That he was remorseful and had begged for leniency.

5. That the age of the complainant being dubious the sentence was harsh and excessive.

In the written submissions, he emphasized that the evidence on record did not prove that he committed the offence. He referred to the evidence of PWI, PW2 and PW3 and stated that he was mentally disturbed and psychologically confused during the trial. He complained that the court did not give him ample time to consider the consequences of pleading guilty to the offence. He stated also that he was very sorry and remorseful, and that infact the age of the complainant was not proved to be between 8 and 9 years.

The learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that after 3 Prosecution witnesses had testified, the appellant stated that he wanted to change his plea to guilty. Counsel contended that the appellant knew that the charges he was facing were serious with a mandatory life sentence when he elected to plead guilty. Counsel emphasized that the magistrate went out of his way to warn the appellant four times about the severity of the sentence, but appellant insisted on pleading guilty, after which the facts were summarized and he admitted the same. Counsel submitted that the appellant could not thus come to this court on appeal and say that the plea was equivocal. Counsel submitted that under the provisions of Section 348 of Criminal

Procedure Code (cap. 75), the appellant could only challenge the sentence and not the conviction, as he had pleaded guilty to the charge.

Counsel further submitted that when the appellant was asked by the court to mitigate, he stated that he had nothing to say, which meant that he was not remorseful. Counsel pointed out that there was no defence to be considered by the trial court as the appellant had pleaded guilty. In counsel's view, the documents tendered by the prosecution in court, established occurrence sexual intercourse as the hymen of the complainant was broken. In addition, counsel contended that age assessment was done and it was established that the age of the complainant was between 8 and 9 years. Counsel thus submitted that the appeal lacked merit.

In response to the Prosecuting Counsel's submissions, the appellant stated that he did not understand the trial court proceedings, as he was seriously injured all over the body and was still feeling pain, even during appeal.

I have considered the appeal and submissions on both sides. I have perused the record of the trial court.

The appellant herein was convicted on his own plea of guilty to a charge of defilement of a girl aged 9 years. He was then sentenced to serve life imprisonment. He has now come to this court on appeal.

This being a first appeal, I am is required re-examine the record and come to its own conclusions and inferences ***See the case of Okeno -vs- Republic (1972) EA 32.***

I have perused the record of the proceedings in the trial court. When the appellant was brought to court on 12th February 2014, he pleaded not guilty to count 1 and the alternative count. He however pleaded guilty to count II for unlawful possession of 200 grams of cannabis sativa. He was convicted of that offence and sentenced to pay a fine of Kshs 10,000/= and in default to serve one year imprisonment. He has not appealed against that conviction and sentence.

With regard to count 1 and the alternative count, after a number of mentions of the case before the trial court, on 12th of July 2014 three witnesses including the complainant, all being minors, testified. The complainant testified as PWI but not on oath. PW2 testified on oath, though he was a minor. PW3 also testified but not on oath. The case was then adjourned.

Up to that point, the appellant maintained his plea of not guilty.

On the 5th of August 2014 however the appellant informed the court that he wanted the charges to be read to him afresh with the intention of changing his plea. The charges were then read to him afresh and he was warned by the court on the severity of the sentence. He was however recorded as saying that he was guilty. As the

prosecutor did not have all the relevant documentation, he asked for time to prepare the facts before tendering the same in court.

When the matter came up again in court on the 12th of August 2014, the appellant was warned again by the court on the gravity of the offence. As a result he stated that he did not wish that the charges be read to him again, and changed his plea and a hearing date fixed.

The case came up for hearing on 28th October 2014 and the prosecutor stated that he was ready with two witnesses. The appellant however stated that he wanted to admit the charges. The court again warned him of the severity of the sentence if he was convicted. The appellant was however recorded as having said that though he knew of the severity of the charges, he wanted to plead guilty.

The court then allowed that the charges be read again to the appellant in Kikamba language and he stated that it was true. A plea of guilty was thus entered. The prosecutor then gave a summary of the facts and produced a number of documents. In response, the appellant stated that the facts were true. He also said that he did not have any mitigation.

The court thereafter ordered a social inquiry report to be brought from the Children's Officer on 12th November 2014. However the court then proceeded and sentenced the appellant to serve life imprisonment on the same 28th October 2014. The court record does not indicate whether the matter was brought up for mention on 12th November 2014 for the presentation of the Children Officer's report.

The appellant has stated on record that he did not understand the charge and that the police persuaded him to plead guilty. From the record it is clear to me that the appellant understood the charge. He pleaded guilty to count II of possession of bhang and was convicted and sentenced. He has not complained about that plea or the sentence. He has not appealed on the same.

As for the charge of defilement, the record shows that he opted a number of times to plead guilty. The learned magistrate on each occasion warned him on the consequences of pleading guilty, as the sentence for the offence was a severe one. He was however adamant that he wanted to plead guilty. There is no indication that he was tortured or injured by the police or by anybody to force him to plead. There is no indication that he had any mental disturbance or incapacity when he pleaded guilty to the charge. The facts were summarized to him before he was convicted.

In my view, his complainant that he did not understand the charge and the severity of the sentence and

that the police coerced him to plead guilty is an afterthought. His is attempting to change his plea of guilty on appeal, which is not acceptable see the ***case of Okeno –vs- Republic (1969) EA 378.*** The facts show that he indeed admitted the charge of defilement. He also accepted the facts as summarized by the prosecutor. His plea was thus unequivocal.

The appellant has raised the issue of proof of age of the complainant. In the charge sheet he age of the complainant said to be 9 years. A medical age assessment report from Kyuso District Hospital dated 11th February 2014 was tendered indicating that the estimated age bracket of the complainant was 8 to 9 years. It was based on an estimate from the inference that enrolment for nursery class studies was generally as at 4 to 5 years, and taking into account that the complainant was by then in Standard 3.

Indeed, this assessment cannot be taken to be a scientific assessment of the age of the complainant. In my view however, it was established that the complainant was a child below the age of 10 years as she could not even tender evidence on oath. The magistrate must have seen her and been convinced that the complainant was fairly young. I find no reason to depart from the finding of the magistrate that the complainant was young. I am of the view that the facts established the age of the complainant to be between 8 and 9 years.

Since the appellant pleaded guilty, and the prosecutor did not rely on the evidence which was tendered by the complainant PWI and the two other witnesses. PW2, and PW3 the appellant is thus wrong in bringing the issue of evidence tendered by the 3 witnesses in court. The learned magistrate did not rely on that evidence and he was not entitled to do so since the prosecution did not adopt that evidence.

The summary of evidence given by the prosecutor in my view, clearly established the offence of defilement. The complainant was found to be bleeding. Her hymen was broken. Her clothes were blood stained. She attended medical treatment which confirmed that situation. The only thing which remained hanging was the identity of the person who committed the sexual assault against the complainant. The appellant admitted that he was the culprit. In my view the facts given by the prosecutor established all the ingredients of the offence of defilement. As such the finding of the learned magistrate on the sufficiency of the facts cannot be faulted.

Lastly, with regard to sentence, the sentence provided by law in sexual offences is very severe. The age of the complainant (victim) is a determinant factor on the sentencing. Under section 8 (2) of the Act where the victim ia aged eleven years and below the mandatory sentence is life imprisonment. In my view, it was established that the complainant was in the age bracket on 9 years when the offence was committed. The sentence provided by law being a mandatory life sentence, the trial court did not have an option but to pronounce the

sentence. The sentence was thus lawful and can neither be said to be harsh nor excessive.

To conclude, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

Dated and delivered at Garissa 30th November 2015.

GEORGE DULU

JUDGE