



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.37 OF 2014

(Being an appeal from the original conviction and sentence in Criminal Case No.512 of 2014 of the Principal Magistrate's Court at Kilgoris delivered on 24th April 2014 by Hon. Hon. M. N. Munyendo – RM)

ROBERT BETT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein **ROBERT BETT**, was charged with the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006**.

The particulars of the charge were that on 21st April 2014 at [particulars withheld] area in Transmara West District of Narok County caused his penis to penetrate into the vagina of **M.C.T (name withheld)** a girl aged three (3) years.

2. The Appellant also faced the alternative charge of **Indecent act with a child contrary to Section II (1) of the Sexual Offences Act No.3 of 2006**.

The particulars of the alternative charge were that on 21st April 2014 at [particulars withheld] area in Transmara West District of Narok County, unlawfully and indecently assaulted **M.C.T (name withheld)** a girl aged 3 years by touching her private parts namely vagina.

3. On 24th April 2014, the Appellant appeared before the magistrate's court where he pleaded guilty to the main charge of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006** and the magistrate proceeded to convict him on his own plea of guilty and sentenced him to serve life imprisonment.

4. The Appellant has therefore, in this appeal, appealed against both the said conviction and sentence. In his said appeal filed on 7th May 2014, which he has called "*mitigation of Appeal*," the Appellant has put forth 6 grounds of appeal which can be summarized as follows:

- The Appellant complains that he was never given time to be sober before he could respond to the charges, that he was pressured by the prosecution to admit the charges so that he could get the court's mercy and that he was beaten during his arrest and this affected his reasoning in court.

5. At the hearing of his appeal, the Appellant opted to rely entirely on his written submissions in which he

reiterated the grounds on his petition of appeal. He stated that he was a first offender and that he pleaded guilty due to fear, panic and pressure from the prosecution. He also complained of having been beaten by members of the public during his arrest and that the combination of all these factors clouded his mind and reasoning during the plea to the extent that he was not able to reason well or mitigate in his case.

6. The Appellant conceded that even though the language used in court during his trial was English, the same was translated to his Kipsigis language, but he did not interpret them well. The Appellant prayed that his sentence be reduced or quashed or for an order for retrial.

7. Mr. Otieno counsel for the State on his part opposed the appeal while submitting that the Appellant pleaded guilty to the charge of defilement and maintained his guilty plea even after the magistrate had warned him of the consequences of pleading guilty to such a charge and given him a chance to change his plea.

8. According to Mr. Otieno, the Appellant had all the ample time to clear his mind of any lingering fear or intimidation at the time the magistrate disclosed to him that he had a chance to take a fresh plea.

9. On the sentence, Mr. Otieno submitted that life imprisonment was the only sentence available in a case of defilement and that since the plea of guilty was unequivocal, the appeal lacked merit and ought to be dismissed.

10. In this instant case, no witnesses were called to testify since the Appellant pleaded guilty to the main charge, but the prosecution tendered documentary evidence in support of the charge.

11. This court is obligated to analyze the record of the lower court and to evaluate the circumstances under which the plea was taken in order to determine if the same was unequivocal.

12. **Section 348** of the **Criminal Procedure Code** states that a person has no right of appeal against a conviction resulting from his/her guilty plea. He can only question the legality of the sentence. However, an equivocal plea can be a basis of an appeal or revision.

13. The record of the magistrate shows that the charges were read to the Appellant in Kipsigis which he understood and that the translation was done by one Bett. The Appellant is recorded to have responded to the charges as follows:- **“It is true.”**

After that reply, the magistrate recorded:

“COURT: - The consequences of pleading guilty to the offence is explained to the accused person and he is given an opportunity to take plea afresh.”

The main charge was then read afresh to the accused who still replied: **“It is true.”**

The court then recorded a plea of guilty.

The court prosecutor then proceeded to read the facts that the Republic was relying on to prove the charge against the Appellant.

14. The facts were stated as follows:-

“On 21st April 2014 at [particulars withheld] area, Transmara West, Narok County the complainant who is 3 years old was left by her mother inside her house sleeping in the bedroom. The mother had another child aged 2 months. She took the young child at a neighbour’s house as she went to Oldonyorok. Accused was also within the compound. As the mother to complainant was going she forgot taking money, so she went back. When she went to house she found accused person leaving her house and heard the complainant crying. As she entered the house, she asked who had awaken the child.

The child said accused had waken her up. As the child was still crying, she decided to check on what had happened. She noticed some whitish fluid on the child's clothes. She took her outside to check her. She undressed her, she discovered some sperms smeared on her private parts, she raised an alarm. Members of public responded and accused person was arrested, the father of the child was also called. As they were waiting for father to come accused managed to escape. This matter was reported to Kerinkani Police Patrol Base, the child was taken to Lolgorian Sub-district Hospital for medication. On 23rd April 2014, the accused was traced and arrested by members of public and police. Complainant was issued with a P.3 form which was duly filled. Which show there was penetration and spermatozoa seen. The accused person is then charged with offence before court. The child who is three years is before court. That is the child. I wish to produce the P3 form dated 23rd April 2014 as exhibit 1 and the birth notification. The one dated 22nd August 2011 be produced as exhibit No.2. That is all."

The facts, which formed the basis of the charge, having been read to the Appellant, he is recorded to have responded: **"The facts are correct."**

The magistrate then proceeded to convict the Appellant based on his admission of the facts.

15. The lingering question to be answered at this point is whether the Appellant's plea was unequivocal. In **P.Foster (Hallege) Ltd vs Roberts (1978) 2 AII ER 751, 754-755** it was held thus:

"For a plea to be equivocal the Defendant must add to the plea of guilty qualification which, if true, may show that he is not guilty of the offence charged. The company had added no qualification to their pleas which were therefore unequivocal."

The Appellant admitted the charge and confirmed the facts as read to him to be correct. I find that in those circumstances, the plea was unequivocal.

16. The age of the Complainant of 3 years was verified in the P3 form produced as Exhibit 1 and the Birth Notification Form produced as Exhibit 2. (**See Francis Omuroni vs Uganda, Court of Appeal Criminal Case No.2 of 2000**).

17. The medical evidence produced proved sexual assault. From the P3 form, the hymen was broken with fresh tears, the labias inflamed (*reddish*) and spermatozoa and pus cells seen. Medical evidence adduced proved that penis had been inserted in the genital organ of the Complainant. This was cogent proof of penetration and therefore I find that the Complainant was defiled.

18. Finally and of most importance is the allegation by the Appellant that there were facts that made him panic and cloud his mind to plead guilty. That he was pressurized by the prosecution, tortured by members of the public and the police thus affecting his reasoning in court by making him plead guilty to the charge.

19. In effect, the Appellant appears to suggest that he was not in a proper frame or State of mind to plead to the charges at the time they were read to him **Section.162 (1)** of the **Criminal Procedure Code** provides as follows:

"When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness."

20. A reading of that Section suggests that the court is obligated to make an enquiry into the accused's state of mind if it has reasons to believe that the accused is not in the right state of mind. This requirement is not applicable to all accused persons and the burden of introducing evidence of sanity was upon the Appellant at the trial stage. A perusal of the record of the lower court does not suggest that the Appellant complained of any pressure from anyone or any discomfort that could have prevented him from

proceeding with the case with a clear mind. The appropriate time that the Appellant could have addressed the court on his unclear state of mind was during his mitigation, he however expressed himself clearly and appropriately as recorded by the trial court.

21. From the record of the lower court, I am satisfied that the Appellant's plea of guilty was clear and unequivocal. The magistrate duly warned the Appellant of the dire consequences of a guilty plea in such a charge and gave him a chance to take a fresh plea in the event he wished to change his mind, but he still maintained his guilty plea.

22. I find that the Appellant's grounds of appeal that he was under pressure from the prosecution to plead guilty or that he feared/panicked have no basis at all. There is nothing in the record of the lower court which would suggest that the Appellant was under pressure from anyone. The trial magistrate went to great lengths to warn the accused of the danger of pleading guilty and granted him a chance to take a fresh plea as is required by the law. I am satisfied that the magistrate made sure that the Appellant understood the proceedings. I note that even in his appeal, the Appellant repeats that he pleaded guilty to the charge and states that he is sorry for the "*demonic act due to satanic temptations*" and pleads with the court to reduce his sentence due to his youthful age and the fact that he was a first offender.

23. I am also satisfied that the Appellant voluntarily pleaded guilty to the main charge and in mitigation sought forgiveness saying that he will not repeat the offence. I note that the Appellant had a chance, even during mitigation, to recant his plea which chance he did not utilize.

24. I therefore dismiss his appeal on conviction. On sentence, the Applicant has alluded to the same as being too harsh taking into account the fact that he was aged only 18 years and that he was a first offender.

The **Sexual Offences Act at Section 8 (2)** states:-

"A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life."

The victim in this case was aged 3 years and therefore, I find that the life sentence passed on the Appellant was lawful. With regard to the age of the Appellant, at no time did the Appellant bring to the attention of the trial court that he was a school boy aged 18 years.

25. The trial court could only make a finding on that aspect based on the facts brought before it. In any event, a person aged 18 years is an adult under the law and as such, the Appellant could not have been given any special or preferential treatment during the trial based on his age.

26. I find that the life sentence imposed on the Appellant is lawful and mandatory for a person who defiles a child of the age of the Complainant (3 years).

27. I affirm the conviction and sentence. Accordingly the appeal is dismissed.

Dated, signed and delivered in open court at Kisii this 3rd day of November, 2015

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Majale for State
- Appellant: in person
- Mr. Ogega: Court clerk

