



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 28 OF 2015

BETWEEN

E O A APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 93 of 2011 at Chief Magistrates Court at Homa Bay, Hon. O. J. Ongondo, SRM dated on 21st March 2011)

JUDGMENT

1. In the subordinate court, the appellant faced a charge of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006***. The particulars were that on 3rd February 2011 at [Particulars Withheld] in Homa Bay County, he unlawfully did an act which caused penetration with his penis into the vagina of LAO a child of 4 years. He also faced a charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.
2. The appellant pleaded guilty and was convicted and sentenced to life imprisonment. He now appeals to this court against the conviction on the grounds set out in the petition of appeal which may be summarized as follows: that there was no interpretation done during the hearing of the case, that the court failed to consider his state of health at the time of plea and that he was beaten up and forced to admit the offence before the court.
3. In opposing the appeal and supporting the conviction, Mr Oluoch, learned counsel for the State, submitted that the charge and elements thereof were read to the appellant and the conviction was therefore proper. He submitted that the plea was unequivocal.
4. The requirements recording a guilty plea provided for under **section 207** of the ***Criminal Procedure Code (Chapter 75 Laws of Kenya)*** were elucidated in ***Adan v Republic [1973] E.A. 445*** as follows:-
 - i. The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language he understands
 - ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

- iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the fact or add any relevant facts.
 - iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered.
 - v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.
5. The proceedings show that the procedure for recording a guilty plea was adhered to when the guilty plea was entered. The record shows that when the appellant appeared in court for the first time on 4th February 2011, the appellant admitted the charge and a guilty plea was entered. After the facts were read to him, he responded that the some facts were true and some were not true consequently a not guilty plea was recorded and the matter fixed for hearing. On 16th March 2011, the appellant requested that the charge be read to him once again and the court obliged. He pleaded guilty. He accepted the as true when they were read to him. When he was called upon to mitigate, the appellant did not say anything to suggest a change of plea.
 6. As regards the language of the proceedings, the record is clear that there was a *Dholuo* interpreter and that the proceedings were duly translated. No objection was raised on this issue during the proceedings. I am therefore satisfied that the appellant's plea of guilty was unequivocal. I affirm the conviction.
 7. From the record it is apparent that the issue of the appellant's age was raised at the time the plea was taken. The learned magistrate directed that the appellant's age be assessed. On 4th March 2011, a report was shown to the magistrate and he recorded the following, "*I have seen Dr Ager's assessment for the accused. He is over 18 years old as per the report of 4.02.2011.*"
 8. The record does not show that the report was produced in evidence or kept as part of the record. The appellant was not informed of the contents of the report and asked to comment on the same. When called upon to mitigate after conviction, the appellant stated that, "*I request to be taken to school even if I am jailed.*"
 9. From the evidence, it is likely that the appellant was below the age of 18 years when he committed the offence. I therefore agree with the concession by learned counsel for the respondent, that the appellant is entitled to the benefit of doubt on the issue of his age. In the circumstances, the appellant ought to have been sentenced as a child in accordance with **section 191** of the ***Children Act***. As he has served 4 years imprisonment, I sentence him to time served and I direct that he be released forthwith unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 17th day of November 2015

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.