



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 17 OF 2015

(Coram: Hon. J. A. Makau – Judge)

BEN OKELLO ONYANGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against the sentence in Criminal Case No. 1205 of 2014 in Bondo Law Court before Hon. M. M. NAFULA – S.R.M.)

JUDGMENT

The appellant **Ben Okello Onyango** was charged with one count of **Defilement Contrary to Section 8 (1) (2) of The Sexual Offences Act No. 3 of 2006** in the Principal Magistrate's Court at Bondo. **Ben Okello Onyango** was also charged with an alternative count of **Committing an Indecent Act to a Child Contrary to Section 11(1) of The Sexual Offences Act No. 3 of 2006**.

The particulars of the offence of defilement were that on 23rd day of December 2014 at around 2.00 p.m. [particulars withheld] sub-location of Rarieda sub-County within Siaya County, intentionally caused his penis to penetrate the vagina of BMA a child aged 5 years. On the alternative charge, the particulars were that on the above mentioned date and place the appellant intentionally touched the vagina of BMA a child aged 5 years.

It was the prosecution's case that on 23rd December 2014 at 2.00 p.m. the complainant, BMA was playing with other children when the appellant went there. All children ran away leaving the complainant behind. The appellant grabbed the complainant and started defiling her. The other children returned and found the appellant defiling the minor. The minor's father was informed and went to the scene and took the minor to the Madiany Hospital. He later reported the incident to Aram Police Station. A P.3. Form was filled and signed. P.3. Form was produced as exhibit 1 and Post Care Form as exhibit 2. The appellant was subsequently arrested and charged with the offence.

That when the charge was read to the appellant in **Luo** language which he understands he replied that it was true. That the facts of the prosecution case were given by the prosecutor and was explained to the appellant who on being asked whether facts were correct, replied that the facts were true. The Court subsequently entered a plea of guilty against the appellant on the main count and sentenced the appellant to life imprisonment. The appellant being aggrieved by the conviction and the sentence filed an appeal to this Court on 23rd April 2015 setting out the following grounds of appeal:-

“(a) That I pleaded guilty out of sheer ignorance.

(b) That I did so after a promise by the prosecution that I would be set free.

(c) That I pray for a retrial so I may argue my case afresh.”

The Appellant appeared in person and in support of his appeal relied on his Oral submissions. He challenged the sentence urging that when he was arrested he was assaulted and that caused him to be confused and as such he could not defend himself properly. He further urged he was not taken to hospital for medical examination and the complainant did not appear before Court. The Appellant urged the Court to reduce the sentence to 20 years as he is a first offender, an orphan and he has no one to visit him at the prison.

Mr. Ombati, Learned State Counsel opposed the appeal on the grounds that the victim was a minor aged 5 years; that the appellant pleaded guilty to the charge and confirmed the facts given by the prosecution were true. He urged that no appeal should be allowed where the accused has pleaded guilt in terms of **Section 348 of the C.P.C.** Subject to the exceptions thereto. In support of that proposition the State Counsel cited the case of **Job Ntabo Ratemo V. Republic C.A. CR. Appeal No. 96 of 2014 (C.A. at Nairobi)** and **Mulwa Ngunduru V. Republic HC. Criminal Appeal No. 22 of 2013 (GARISSA)**

On the other hand Mr. Ombati Learned State Counsel submitted **Section 8(2) of The Sexual Offences Act** provides for mandatory sentence where the victim is below 11 years and as the lower Court awarded the mandatory sentence of life imprisonment as provided by Law, the Court cannot interfere with the sentence so imposed.

When the appellant was brought before the trial Magistrate's Court (**The Principal Magistrate's Court at Bondo in Criminal Case No. 1205 of 2014**), he entered a plea of guilty to the main charge. The prosecution read out

the facts of the case to which the appellant confirmed to be true. The Plea of guilty as entered by the trial Court is not challenged by the appellant in this appeal.

I have perused the Court's proceedings and the exhibits and I am satisfied the plea entered against the appellant was and is unequivocal under the provisions of **Section 207 of the Criminal Procedure Code** which provides:-

“(1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;”

The appellant in this appeal did not challenge the conviction. The facts given by the prosecution support the charge of defilement. The appellant was properly identified as the assailant and has not challenged that fact. The facts as stated and the exhibits, thus P.3. Form exhibit 1 and Post Care Form exhibit 2 proof that there was penetration as the complainant had bruises on the **labia minora**. The Oxford English Dictionary defines **Labia Minora** as follows:- ***“the smaller inner folds of the vulva.”*** The bruises on the **labia minora** of the minor herein is a proof of partial penetration of the appellant's genital organs into the genital organs of the complainant. The facts and exhibits produced by the prosecution proved penetration. In a case of defilement, the main ingredient to the offence is penetration. The other ingredients are identification of the perpetrator of the offence and the age of the victim. All these were proved in the facts given and which appellant admitted to be true and correct.

Mr. Ombati, Learned State Counsel submitted that under **Section 348 of the Criminal Procedure Code** that no appeal lies in a case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate Court, except to the extent or legality of the sentence. In the case of **Mulwa Ngunduru V Republic Hc Cr. A No. 22 Of 2013** Hon Lady Justice S. N. Mutuku quoted section 348 of the Criminal Procedure Code and held that no appeal lies for an accused persons who pleaded guilty and

has been convicted on his own plea by a Subordinate Court save to the extent or legality of the sentence.

The Appellant in this appeal challenges the sentence on the ground of sheer ignorance; promise by the prosecution that he would be set free and sought a retrial. The appellant pleaded guilty and was convicted on his own plea of guilty. The appellant's claim that he pleaded guilty due to sheer ignorance. He has not disclosed whether the ignorance was on law or what? But it is trite law that ignorance of law is no defence nor can it be applied to declare plea of guilty equivocal plea of guilty. The appellant in the Lower Court was not convicted on his own confession but on admission of the charge and facts as read and explained to him in the language that he understands. He did not state when admitting the facts who made the alleged promise to set him free and if so when. That if any promise was made it cannot be raised on appeal nor can such promise be enforced as it is against the law and public policy in such serious offence as this one. I therefore find no merits in the appellant's ground No. 1 of the appeal.

On ground No. 3 the appellant prays for retrial so as to be able to argue his case afresh. On issue of ordering retrial I am guided by the case of **Richard Omollo Ajuoga V. Republic HCCR.A No. 223 Of 2003**. The Court set out the Principle to be applied as follows:

“In the case of AHMED SUMAR V REPUBLIC [1964] EA 481 on Page 483, the predecessor to this Court stated as follows:-

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.

The Court continued at the same page at paragraph 11 and stated further:-

“We are also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.

Taking the cue from that decision, this Court in the case of Bernard Lolimo Ekimat Vs. Republic Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-

“There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to Court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”

In view of the above I am satisfied that a retrial shall serve no purpose. The retrial if ordered in this case would not be in the interest of justice and is likely if ordered to cause an injustice to the appellant having to face the charge afresh and the trial may be delayed and cause injustice. In view of the particular facts of this case and circumstances of this case a retrial would be against the interests of Justices for the victim and the appellant. I therefore find no merits in the appellant's prayer for retrial. 3rd ground of appeal is dismissed.

On sentence **Section 8 (2) Of The Sexual Offences Act** Provides:

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

The sentence provided under the above-mentioned Section for a person who commits an offence of defilement with a child aged 11 years or less upon conviction is a mandatory sentence of life imprisonment. The Court however sympathetic and humane it may be cannot impose any other sentence but life imprisonment. The Court's hand are tied by the law as there is no room for Court to exercise any discretion in imposing the sentence. The only sentence provided being one and being life sentence, and having found that the appellant at his own plea pleaded guilty to the offence, I find no merits in appellant's prayer for Court to interfere with the sentence. The appeal against sentence has no merits.

The upshot is that as appellant's appeal against sentence has no merits; the same is dismissed.

DATED SIGNED AND DELIVERED AT SIAYA THIS 13TH DAY OF NOVEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 13TH DAY OF NOVEMBER, 2015.

In the presence of:

Mr. Ombati State Counsel – present

Appellant – Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akida

J. A. MAKAU

JUDGE