



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO 113 OF 2013

DOMINIC MOKAYA ONGERA.....ACCUSED

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGEMENT

This is a criminal appeal by Dominic Mokaya Ongera, now the appellant in this matter. He is appearing in person.

His was charged of defilement of a child contrary to section 8(1) as read with S.8 (2) of the sexual offences act No.3 of 2006.

The particulars thereof were that on 23rd day of October 2012 in Biticha sub-location, Masaba North district within Nyanza province unlawfully and intentionally committed an act which caused penetration to the genital organ namely anus of H O S a boy aged 4 years with his genital organ namely penis.

Alternatively, he was charged of indecent act with a child contrary to S.11 (1) of the sexual offences Act No.3 of 2006.

The particulars were that on 23rd of October 2012 in Biricha sub-location Masaba North District within Nyanza Province, intentionally touched the anus H O S,a child aged 4 years with his penis.

The accused when charged for the said two counts at Kerokas, Criminal Case No.1309 of 2012, he pleaded guilty Ni Kweli,Ni Kweli to both counts.

Thus the court entered the plea of guilty against him and convicted him on his own plea.

Accordingly, he was sentenced to life imprisonment on 16/10/12

The accused person being dissatisfied has now appealed.

His petition filed on 30th October 2013 sets out five (5) grounds:

1. The learned trial magistrate erred in law and fact in convicting a sentencing me in a plea that was not unequivocal.

2. The learned trial magistrate erred in facts and law in conducting the proceedings in a language I did not understand thereby occasioning miscarriage of justice.

3. The learned trial magistrate erred in law and fact in failing to explain to me the charge and particulars in Ekegusii language which I do understand thereby occasioning failure of justice.

4. That the maximum sentence awarded to me was excessive, harsh and not based on the known principles of sentencing.

5. That the proceedings before the honourable court were unlawful and against the criminal procedure code.

In essence the petitioner is appealing against both conviction and sentence.

The appellant filed his written submission

He states that the plea was as a result of undue influence and coercive confession, that he was but framed and fixed in this matter.

The Respondent's Submissions

The provision of s.348 of CPC precludes an appeal where an accused person has pleaded guilty.

However, the emerging jurisprudence of the court of appeal, particularly the decision of **Wandete David Munyoki Vs Republic 2015** (Unreported eKLR, the Court held the appellant court can entertain an appeal arising from the conviction of plea of guilty. Depending on certain circumstances which, I submit, are absent in the instance case.

The petitioner states that the proceedings were conducted in a language he did not understand, see ground 2.

The records of the lower court indicates that the trial magistrates that the charge was read in Kiswahili language, a language he most have preferred, as he did not state otherwise.

The learned magistrate had the benefit of conducting the trial. So far for her to have said that the accused person understood Swahili ??well?? she must have been satisfied of that fact. Therefore the petitioners ground 1, would not stand, where he alleges the plea was equivocal.

Therefore, I submit that and, 50(2) & (h) of the constitution was complied with. The plea was unequivocal.

The facts as read to the accused person which facts satisfied the ingredients with which he was charged. The penetration of his genitalia to that of the Victim.

The said victim was medically examined P3 form duly filled which confirmed the penetration.

The issue of identification was clearly established. The offence was committed in the presence of the victim's brother.

On plea day, the accused person was invited to respond to the fact which he adopted to be true, forcing the trial magistrate to maintain the plea of guilty and duly convicted the accused person.

The petitioner's ground 5, there is nothing to indicate what he is saying from the trial record.

The role of the first appellant court is to read the testimonies of the lower court, evaluate the evidence and reach an independent conclusion, having regard to the fact that you neither saw nor heard the testimonies.

See Oleeno, v/s R, EAR (1972) EA.32

FINDINGS

The appellant pleaded guilty to the charge as read to him, and pleaded Ni Kweli, Ni Kweli. The trial magistrate had no alternative but to enter the plea of guilty and convict the accused accordingly.

Therefore this court holds that the conviction was in order and the same ought to be upheld.

The appeal by the appellant be and is hereby dismissed.

It so ordered

Dated and delivered at Nyamira this 13th day of November, 2015.

C. B. NAGILLAH

JUDGE

In the presence of:

Appellant in person

Malesi for the Respondent

Mercy- Court Clerk