



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 171 OF 2014.

ZAKAYO MULIKA ::: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(An appeal from the conviction and sentence of Hon. J. Ong'ondo – PM in Kakamega Chief Magistrate's Court Criminal Case No. 5089 of 2014 delivered on 24th October, 2014.)

J U D G M E N T.

1. The appellant was charged with the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 2nd day of October, 2014 at [Particulars Withheld] village, Ilesi location, Kakamega East District within Kakamega County, intentionally and unlawfully inserted his genital organ namely penis into the genital organ namely virgina (sic) of **R.K.** a child of 6 years.
2. He was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars being that on the 2nd day of October, 2014 at [Particulars Withheld] village Ilesi location, kakamega East District within Kakamega County, unlawfully and intentionally contacted his genital organs namely penis into the genital organ namely virgina (sic) of **R. K.** a girl aged 6 years.
3. The appellant was arraigned in court on 8/10/2014 where the charges were read out to him. The appellant was warned of the stiff penalty for the charges he was facing. He pleaded not guilty to the main charge of defilement but pleaded guilty to the alternative charge of indecent assault. A plea of guilty was entered.
4. The prosecutor asked for time to narrate the facts before court. He was granted a hearing date for 10/10/2014. On that day the prosecutor was not ready with the facts. The appellant attended court on 24/10/2014 and asked for the charges to be read out to him. The charges were read out to him in Isukha language and he pleaded guilty to the main charge of defilement. A plea of guilty was entered.
5. The prosecutor read out the facts of the case to the appellant who responded as follows:-

“Facts are true: I will not repeat it.”

The learned trial magistrate thereby convicted the appellant on his own plea of guilt.

6. In mitigation, the appellant said thus:-

“I am sorry. I feel so bad. I will not repeat.”

The court noted that the victim was 6 years old and sentenced the appellant to life imprisonment.

7. The appellant filed a petition of appeal raising the following grounds of appeal:-

- i. ***That he was not forewarned on (sic) the consequences of pleading guilty to this (sic) charge;***
- ii. ***That the police advised and convinced him to go (sic) and say yes and he will (sic) be released only to realize that he is now imprisoned;***
- iii. ***That he did not commit this (sic) crime;***
- iv. ***That at the time of plea taking he was ill, confused and inexperienced in the law process; and***
- v. ***That the trial court did not realize that age (sic) of the complainant was not ascertained.***

8. In his written submissions which he amplified in court at the hearing of his appeal, he indicated that the police told him to admit the offence and he would be released. He further said that there was a grudge between him and his employer about his salary and that his employer said that he defiled a child.

Determination of the appeal

9. This court notes that the appellant when given an opportunity to mitigate in the lower court did not raise the issue of a grudge between him and his employer or that he was ill and confused. Had he done so, the learned trial magistrate might have entered a plea of not guilty.

10. The appellant in his petition of appeal states that he was not forewarned of the consequences of pleading guilty to the charge. A perusal of the proceedings of 8/10/2014 when the appellant first appeared in court shows that the court warned the appellant of the stiff penalty for the offences he was charged with. He was therefore forewarned

11. Mr. Oroni, prosecuting counsel, supported the conviction and sentence and submitted that the appellant was convicted on his own plea of guilt which was unequivocal. He prayed that the appeal be dismissed.

12. In the case of **Adan vs. Republic [1973] EA 445**, the court set out the steps to be followed by the court when taking a plea. This was restated in the case of **Kariuki vs. Republic [1984] KLR 809** at 810 as follows:-

- i. ***The trial magistrate should read and explain to the accused the charge and all ingredients in the accused’s language or in a language he understands;***
- ii. ***He should then record the accused’s own words and if they are an admission, a plea of guilty should be recorded;***
- iii. ***The prosecution may then immediately state the facts and the accused person should be given an opportunity to dispute or explain the facts or to add any relevant facts;***
- iv. ***If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded a change of plea entered, but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence the accused’s reply.”***

13. In the instant case, the learned trial magistrate followed all the above procedures before convicting and sentencing the appellant. This court notes that the plea taken at the lower court was clear and unequivocal. The language that the appellant used in court on 24/10/2014 was Isukha. The appellant therefore has no basis for appealing against the conviction.

14. The prosecutor informed the court that the complainant was 6 years old as per her clinic card showing that she was born on 26/10/2007.

15. On the sentence, the appellant was sentenced to life imprisonment which is the only sentence provided under the provisions of section 8 (2) of the Sexual Offences Act, No. 3 of 2006.
16. I note that the charges as drafted were defective in that the main charge brought against the appellant should have been framed so as to read that he was charged with defilement contrary to section 8 (1) as read with 8 (2) of the Penal Code. I invoke the provisions of section 382 of the Criminal Procedure Code to cure the defect.
17. I decline to order a retrial as requested by the appellant in his petition of appeal as there is no sound basis for so doing.
18. This court finds that the appeal herein is without merit. I hereby dismiss it in its entirety.

DELIVERED, DATED and SIGNED at KAKAMEGA on this18TH..... day ofDECEMBER,....., 2015.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Appellant.**

..... **for the Respondent.**

..... **Court Assistant.**