No. 170/2011

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 91 OF 2011

JOSEPH KIETI SEET ..…..... APPELLANT

VERSUS

REPUBLIC ….....….….... RESPONDENT

(B*eing an appeal from the original conviction and sentence in Kajiado Resident Magistrate's Court Criminal Case No. 365 of 2011 by*

Hon. W.N. Kaberia - S.R.M. on 26/4/2011)

J U D G M E N T

1. The appellant was charged with an offence of defilement of a girl contrary to Section 8(1) as read with subsection (2) of the Sexual Offences Act, 2006. Particulars thereof being that on diverse dates between August and September 2010 at ***[particulars withheld]*** village in Kajiado county, willfully and unlawfully did an act that caused penetration of the genital organ of a girl aged 11 years namely L N Y.
2. The charge was read to the appellant in Maasai language and he admitted the same. He was convicted and sentenced to serve life imprisonment.
3. In an amended petition of appeal, he appeals on the following grounds:

1. That the Learned Trial Magistrate erred in law and in fact in entering and convicting the appellant on a plea of guilty when the plea was not unequivocal.

2. The Learned Trial Magistrate erred in failing to inquire into the goodness of mind when for all appearances it was clear the appellant was not fit to plead and was incapable of making his defence as envisaged under Section 162.

3. That the Learned Trial Magistrate erred in law in that having adjourned the case on 15/4/2011 to have age assessment done proceeded to convict the appellant in a defilement charge without an age assessment report.

4. That the Learned Trial Magistrate erred in law and in fact in relying on a Child Health Card as the basis of determining age.

5. That the Learned Trial Court erred in law and in fact in failing to scrutinize the Child Health Card produced as P.EX No. 1 and failed to discover that the name of the child was different from the complainant and the name of the health facility not disclosed in the card

as in the facts presented in court.

6. That the Learned Trial Magistrate erred in law and in-fact in failing to note, analyze and resolve the inconsistencies in P.EX No.1 which is material in sexual offence and in the circumstances of the case before him.

7. That the Trial Magistrate erred in law and in fact in failing to observe that the medical evidence produced did not disclose sexual assault.

8. That the Learned Trial Magistrate erred in sentencing the appellant and the sentence imposed is excessive in the circumstances.

4. In his submissions, Mr. Makundi counsel for the appellant reiterated what was stated in the grounds of the appeal and stated that the charge was defective as particulars thereof were not clear, they did not disclose the part of the body entered.The magistrate disregarded count 2 and he failed to indicate under what provision of the law he convicted the appellant.
5. In a response thereto the state counsel, Mrs. Abuga opposed the appeal. She argued that the plea was unequivocal, the language used was Maasai that the appellant understood. She said the charges as drawn were proper as the nature of the offence was disclosed. She submitted further that the appellant was charged on 12th April 2011 when he pleaded to the charge he faced. The mental assessment was done on 12th September 2012. the report thereof does not indicate when the appellant had the problem. In that case the appellant knew what he was doing when the offence was committed. Finally she stated that the age of the child had been established and the complainant had been properly identified.
6. Under Section 348 of the Criminal Procedure Code, 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, there are exceptions to the rule. For instance an equivocal plea can be a basis of an appeal on revision.
7. In the instant case when the matter came up for plea before the lower court, the court having inquired into the language the appellant understood read and explained the substance of the charge to him in Maasai language.

He then replied to the main charge as follows:

"It is true"

The appellant was remanded in custody. The matter came up on the 15th April 2011 but could not proceed as an assessment of the complainant's age had not been done. The matter came up on the 26th April 2011 after the age of the complainant had been assessed. The prosecutor outlined the facts to the court.Those fact were explained to the appellant in a language that he was conversant with (Maasai). The facts were stated thus:

"On unknown date between August and September 2010, the complainant herein was sent home from school. She found her parents away from home. The accused then came to the home and asked her to prepare tea for him. As she was doing so, accused grabbed her, removed her pant and then had sexual intercourse with her. After the act, the accused threatened to harm her if she told her parents. Later on her mother discovered that she was bleeding. She therefore took her to Kajiado District Hospital where on examination she was found to have contracted a venereal disease. The matter was reported to Isinya police station and accused was arrested. The complainant was born on 21/12/1999. Here is a copy of the child health card – PExh. 1. Her age was assessed and she was found to be 11 years. The age is indicated in the P3 form Pexh. 2. The P3 form also shows that she was defiled. The accused was charged with the offence before court."

These facts that were the foundation of the charge having been read to the appellant he responded thus:

"It is true that I slept with the girl."

This response is what informed the court to convict him on his

plea of guilty.

8. Procedurally he was given an opportunity to mitigate prior to the sentence being passed. He stated that he was going to another home and when he passed by the complainant's home she gave him drinking water and he asked her to prepare tea. She then asked him to have sexual intercourse with her which he did.He added further that he was not married. This mitigation is a confirmation of what the prosecutor presented as facts of the case.

The question to be answered is therefore, whether the plea was equivocal?

In **P. Foster (Hallege) Ltd -Vs- Roberts (1978) 2 ALL ER 751, 754 – 755 it was held thus:**

"... A court cannot accept an equivocal plea of guilty: It … must either obtain an equivocal plea or enter a plea of not guilty. 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 appellant having admitted the charge as aforestated and even explained how he slept with the girl by having sexual intercourse with her; In the circumstances the plea was unequivocal.

9. It was the contention of the appellant that the age of the complainant was not verified. The court was faulted for relying on the child health card as the basis of the age. In presenting the facts of the case the prosecutor stated thus:

"The complainant was born on 21.12.1999. Here is a copy of the child health card. Her age was assessed and she was found to be 11 years. The age is indicated on the P3 form..."

It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of **Francis Omuroni versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000.** It was held thus:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

It is worth noting that in this case the age of the complainant could not be proved by testimony of her parents because the appellant admitted the charge hence the case did not have to go to full trial. Some other cogent evidence adduced was the child health card. It may be important to consider what a child health card is. This is a document used to measure detection and prevention of diseases but it is also used as a record of birth data, growth in mass and generally development of episodes of illness in children. Data in respect of the complainant on that particular card indicate, she was born on the 21st December, 1999. Her name is indicated as L N J. The father's name is included in the card as J M.

10. This child was also examined by a medical practitioner. Per the medical report (P3 form), he assessed the age of the complainant to be 11 years, hence what was presented in facts. Medical evidence and other cogent evidence therefore proved the age of the complainant.
11. This, therefore, brings in the issue whether medical evidence produced disclosed sexual assault. Per the medical evidence produced (P3 form). The hymen was absent. The complainant had a tender inflammed urethra area. Pus cells were detected in her vagina. Medical evidence adduced proved some organ had been inserted in the genital organ of the complainant. This was proof of penetration. Therefore, the complainant was defiled.
12. Though not a ground of appeal, it was submitted that the charge sheet is defective as the particulars of offence are not clear as they do not disclose what the act is and what part of the body entered the genital organ of the complainant. Statute stipulate thus:

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"

A perusal of the charge as drawn and particulars thereof clearly show that all the ingredients constituting the offence of defilement are included. The question one would ask is whether the appellant was prejudiced. Had he not pleaded guilty would we have been able to understand the charge in order to prepare his defence?

Where an accused person is given sufficient particulars that enable him know what the charge against him is to enable him rebut it then it cannot be said to be defective. In **Ridge versus Baldwin (1964) AC 40 Lord Morris** had this to say:

"It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself and in order that he may do so that he is made aware of the charges or allegations or suggestions which he has to meet."

The way the charge was framed, it would have enabled the appellant tell what he was being accused of. In the circumstances it was not defective.

13. Finally and of most importance is the allegation that the appellant was not fit to plead and was incapable of making a defence but the court did not inquire into his state of mind as provided by Section 162 (1) of the Criminal Procedure Code.The cited Section provides thus:

"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."

14. A reading of the Section suggests the court will be obligated to enquire on the accused's state of mind if there is reason to believe that the accused is not in the right state of mind. It is not a requirement that all accused persons charged with criminal offences have to be subjected to mental assessment. Sanity is a rebuttable presumption and the burden of proof is on the party denying it.Put it differently, the burden of proving sanity was on the prosecution but the burden of introducing evidence of sanity was upon the appellant at the trial stage. As I have aforestated, circumstances that prevailed at plea taking time; A perusal of the lower court record thereof does not suggest there was anything amiss in respect of the appellant's sanity. The only time the trial court could have questioned his mental status would have been at the point of addressing the court in mitigation.He expressed himself appropriately as recorded by the court.
15. The appellant was convicted on the 26th April 2011. In his initial petition of appeal dated 10th May 2011 the issue of insanity was not included. He had duly instructed an advocate then. It was not until 15th February 2012 that his advocate notified the court that he had instructions that he had been notified that the appellant's intelligence quotient (IQ) was too low hence lacked clarity as to the threshold. A request formental examination was made and duly granted.
16. On the 17th September 2012 a report confirming he was mentally unstable was filed. The report states thus:

"According to mental state examination, conducted on the 17th September 2012 on Joseph Kieti:-

1. He is mentally unstable.

2. ***He is not fit to plea."***

No history of the patient was given. No other evidence that would suggest that prior to February 2012 the appellant was of unsound mind was adduced. In the circumstances, I find that at plea taking time the appellant was possessed of mental faculties that were capable of distinguishing right from wrong so as to bear legal responsibility for his actions. Consequently the trial cannot be declared a nullity.

17. This is a case where the appellant was charged with what was referred to as count 1 and 2. it was erroneous on the part of the prosecution to refer to the second charge as a principal one. It should have been an alternative count to the main charge. The trial magistrate indeed having convicted on the main count disregarded the 2nd one. Having been intended to be an alternative count he should have acquitted him on the same. Failure to do so was, however, a technicality that was not fatal to the prosecution's case.
18. The sentence imposed was said to be excessive. It was established that the complainant was 11 years old. It is mandatory for a person who defiles such a child to be sentenced to life imprisonment. The sentence meted out was within the law.
19. The upshot of the above is that I have no reason to interfere with the decision of the lower court. I affirm the conviction and sentence.
20. Accordingly, the appeal is dismissed.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **22ND** day of **JANUARY, 2014.**

L.N. MUTENDE

JUDGE