



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 154 OF 2012

ISAACK NJIRU MURIITHIAPPELLANT

-VERSUS-

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case Number 229 of 2010 in the Senior Resident Magistrate's court at Gichugu – HON.B.J. Ndeda (SRM))

JUDGMENT

The appellant **ISAACK NJIRU MURIITHI** was convicted on his own plea of guilty with the offence of defilement of a girl under the age of eleven years contrary to **Section 8(1) (2) of the Sexual Offences Act**.

The particulars supporting the charge alleged that on the 22nd day of March 2010 at Ruambiti sub-location, Baragwi location in Kirinyaga District, the appellant defiled **CM** a child aged nine years

Upon conviction, he was sentenced to twenty years imprisonment. He was dissatisfied with both conviction and sentence hence this appeal.

In his grounds of appeal, the appellant complained that the learned trial magistrate erred in law in not following the prescribed procedure for plea taking in that the charges were not read to him in a language that he understood and further that the learned trial magistrate failed to notice that he had pleaded not guilty to the charges.

He also complained that the learned trial magistrate erred in not appreciating the fact that the medical evidence relied upon by the prosecution did not support the offence charged as it did not confirm the act of penetration.

When the appeal came up for hearing, the appellant relied on written submissions which he presented to the court.

The state through learned state counsel Mr Sitati opposed the appeal submitting that the appeal on conviction should be dismissed since the appellant had been convicted on his own plea of guilty and **Section 348** of the **Criminal Procedure Code** prohibited the hearing of appeals arising from convictions based on the appellants plea of guilty unless the appeal is against the legality of the sentence.

After going through the record of proceedings in the lower court, I find that contrary to the appellants

allegations on appeal, the charges were read over to him in the English language which was interpreted to him in the Kikuyu language, a language which the record indicates the appellant understood. The appellant did not state his grounds of appeal that he did not understand the Kikuyu language.

The facts supporting the charges which clearly disclosed the offence of defilement of a girl aged nine years were stated to the court and to the appellant by the prosecution and in response, the appellant confirmed that the facts as stated were correct.

Having admitted the facts narrating how he had committed the offence, the learned trial magistrate correctly convicted the appellant on his own plea of guilty.

I find that there is nothing in the court record that shows or even suggests that the plea taken by the appellant herein was equivocal. The plea in mitigation offered by the appellant clearly demonstrates that the appellant fully understood the charges facing him before he pleaded guilty. In his mitigations, the appellant stated as follows:-

“The minor agreed to have sex”

This statement leaves no doubt that the appellant admitted to having had sex with a minor which constitutes the offence of defilement. I make this finding because a minor in law has no capacity to consent to sexual intercourse.

From the record, I am satisfied that the plea taken by the appellant in this case was voluntary and unequivocal. I therefore find that he was properly convicted on his own plea of guilty.

In the circumstances, guided by the provisions of **Section 348** of the **Criminal Procedure Code** which I have referred to earlier, I find no merit in the appeal against conviction and I hereby dismiss it.

On sentence, I note that the appellant was charged under **Section 8(2)** of the **Sexual Offences Act NO. 3 of 2006(the Act)** which prescribes a sentence of life imprisonment for a person convicted of the offence of defiling a minor aged below eleven years.

The state counsel correctly submitted that the sentence of twenty years imprisonment imposed on the appellant was illegal since the only sentence authorized by the law under **Section 8(2)** of the **Act** is life imprisonment. The trial magistrate had no discretion to impose any other sentence. The High court under **Section 354** of the **Criminal Procedure Code** has power to alter, reduce or increase on appeal the sentence imposed by the trial magistrate if in its opinion, the trial magistrate wrongly exercised his or her discretion in sentencing the appellant by overlooking some relevant factors or acting on the wrong legal principles. I cannot put it better than the court of appeal did in **WANJEMA VS REPUBLIC (1971)E.A 493** when it stated at page 494 as follows

“ An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it over looked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.....”

In this case, it is clear from the record that the learned trial magistrate in exercising his discretion when deciding the appropriate sentence to impose on the appellant acted on a wrong legal principle as he obviously failed to take into account the sentence prescribed by the law for the offence the appellant admitted to have committed.

As the sentence pronounced on the appellant was plainly illegal, this court being an appellate court must correct it since it cannot turn a blind eye to an illegality. It has a duty to rectify the mistake made by the learned trial magistrate by setting aside the illegal sentence and substituting it with the correct sentence authorized by the law. And as stated earlier, the only sentence prescribed by the

law for the offence is life imprisonment

I am alive to the fact that correcting the sentence in this case will have the effect of enhancing the sentence from twenty years imprisonment to life imprisonment and although it is apparent from the record that the appellant was not issued with a notice cautioning him that there was a possibility of having his sentence enhanced to life imprisonment if his appeal against conviction was unsuccessful, the matter was raised orally in court by the state during the hearing of the appeal and the appellant did not have anything to say in response. He chose to proceed with the appeal even though he had an opportunity of either withdrawing it or demonstrating why in his view the sentence should not be enhanced in the event that his appeal on conviction was dismissed.

In the circumstances and in view of the foregoing, I find that the appeal against sentence is also unmeritorious. Instead of reducing the sentence as urged by the appellant, this court has no alternative but to enhance it from the twenty years imprisonment imposed by the learned trial magistrate to the sentence allowed by the law .

I therefore set aside the sentence pronounced on the appellant by the learned trial magistrate and substitute it with a sentence of life imprisonment to take effect from the date of conviction.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 20th DAY OF JANUARY 2014 in the presence of:

The appellant

Mr Sitati for the state

Mbogo Court Clerk