



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 89 OF 2012

(From original conviction and sentence in Criminal Case No. 501 of 2012 of the Chief Magistrate's Court at Narok, W. N. Njage)

JULIUS KIMELE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The Appellant was on his own plea of guilty, convicted of the offence of defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006, (*No. 3 of 2006*).
2. He was also charged with the offence of escaping from lawful custody, contrary to Section 123 of the Penal Code, (*Cap. 63, Laws of Kenya*) and was sentenced to 20 years imprisonment.
3. As the Appellant had pleaded guilty to the principal charge of defilement, the alternate charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act 2006, was not preferred.

The Appellant has however come to this Court on appeal and his principal ground of appeal is that his plea of guilty was not unequivocal, that he did not understand the language of the court and he was inclined to plead guilty so that he could get a lenient sentence, and that the proceedings do not reflect a fair picture of what transpired at the trial or taking of plea. Mr. Leitipan Counsel for the Appellant consequently urged the court to allow the appeal.

The State however opposed the appeal, that the Appellant was sentenced on his own plea of guilty, that the plea was unequivocal, and that in mitigation, the Appellant pleaded for leniency, this demonstrated that he understands the proceedings. Counsel for the State however conceded that the sentences on the two counts should have run concurrently. He urged the court to allow the appeal.

There are two grounds why this appeal should fail. **Firstly**, Section 348 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*) precludes this court from entertaining any appeal where an appellant has pleaded guilty. The principles upon which a plea of guilty is taken are stated in the case of **ADAN VS REPUBLIC [1973] E.A. 445** and bear a repeat here -

- (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands,
- (ii) the accused's own words should be recorded and if they are admission, a plea of guilty should be recorded,

- (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add to any relevant fact,
- (iv) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and change of plea entered,
- (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

The question to ask and to be answered is whether, the prosecution in this case, adhered to the principles in **Adan vs. Republic** or whether the plea was unequivocal as the Appellant claims. A plea which is said to be unequivocal is a plea which is ambiguous, or is said to be unperfect or unfinished, and that the trial court failed to ensure that the accused understood the charge, and to understand what the plea guilty amounts.

In this case, it is clear from the record that when the charges were read to Appellant, he readily pleaded guilty. Similarly he confirmed the facts as correct when read to him and the plea of guilty was confirmed. When given opportunity to mitigate the Appellant pleaded for leniency as he was a first offender.

The question under Section 348 of the Criminal Procedure Code is whether the sentence and extent thereof was legal.

The Appellant in his appeal does not dispute that he pleaded to the offence on Count II of attempting to escape from lawful custody. The punishment for such offence is three and half years under Section 389 of the Penal Code. The Appellant was sentenced to two years. I think that sentence was in order.

The punishment for defilement of a girl between the age of twelve and fifteen is twenty (20) years. This is the punishment prescribed under Section 8(3) of the Sexual Offences Act, 2006. It is a lawful sentence.

Under Section 14 of the Criminal Procedure Code, sentences of imprisonment in case of conviction of several offences at one trial may be ordered to run consecutively, in the absence of any exceptional circumstances, such sentence should run concurrently.

The proper order to make in this case is that sentences shall run concurrently.

Save as aforesaid, the appeal herein has no merit, and is dismissed with costs.

Dated, signed and delivered at Nakuru this 9th day of April, 2014

M. J. ANYARA EMUKULE

JUDGE