REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 284 OF 2011

ELIUD MIANO MUCHIRA ....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(From original conviction and sentence in criminal case Number 2262 of 2011 in the Chief Magistrate's Court at Kiambu – C. Oluoch (SRM) on 21st October 2011)

JUDGMENT

1. The appellant herein, **Eliud Miano Mucira** was charged with the offence of defilement contrary **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that on 8th day of October 2011 at ***[particulars withheld]*** village in Nairobi, he intentionally and unlawfully committed an act which caused penetration of his genital organ, namely penis into the female genital organ, namely vagina of G. N. N. a child aged 7 years. (Identity concealed on account of her being a minor). In the alternative he was charged with indecently assaulting her contrary to **Section 11(1) of** the **Sexual Offences Act No. 3 of 2006**.

2. I begin by setting out the outline of the proceedings in the trial court. The appellant was first brought before court on 17th October 2011. The charge was read and explained to him, where upon he responded that it was true and a plea of guilty was entered. At this point the prosecution brought it to the attention of the court that the P3 form had not yet been filled and asked that the case be mentioned on a later date with regard thereto.

3. On 21st October 2011 came before the court again. The record shows that the charge was read to and explained to him a second time and that the court employed English/Kiswahili interpretation. For the second time the appellant responded in Kiswahili language that it was true and a plea of guilty was entered. The facts of the case were read to him and he signified that they were correct. The record indicates that he was shown to have no prior records and that he offered no mitigation.

4. The charge sheet shows that the victim of the sexual assault was aged seven years at the material time. The appellant was therefore sentenced to serve life imprisonment as prescribed by law.

5. On the 17th November 2011 the appellant lodged a petition of appeal together with factors to be considered in mitigation. Sometime later on a date that is not disclosed on the face thereof, the appellant filed amended supplementary grounds of appeal under **Section 350** of the **Criminal Procedure Code**. In those grounds he now complained that the learned trial magistrate convicted

him, without inquiring into the reasons behind his admission of the charge and in particular, whether the unlawful detention in police custody had influenced the admission. He stated that he had been severally tortured while in police custody and that the consequences of pleading guilty were not explained to him, hence the plea was equivocal.

6. The appellant also stated that the trial was unfair and un procedural and violated his fundamental rights to fair hearing, for reasons that the plea was taken and the facts read, in the absence of a P3 form and a Government Chemist report.

7. The appeal was opposed by learned counsel Miss Maina on behalf of the respondent. In response to the first ground, Miss Maina submitted that the only duty the court had, was to read the charge and explain it in a manner which the appellant understood. This she said was done and the appellant pleaded guilty. She contended that the appellant's confinement was not unlawful as he was arrested on a Saturday and arraigned in court the following Monday.

8. On the ground that the appellant had admitted the charge because he was tortured by the police, Miss Maina argued that it was an afterthought since it was not raised in court even when the plea was deferred to another date. On the ground that the charge was not explained to the appellant, she opined that the record speaks for itself.

9. On the ground that the P3 form and Government Chemist report were not produced in evidence, Miss Maina urged that this was not fatal to the prosecution case and that a medical report from Nairobi Women hospital was produced in evidence. Further that the Government Chemist report was not necessary in the case. She therefore urged the court to dismiss the appeal and uphold both conviction and sentence.

10. I have reassessed the lower court record in light of the grounds of appeal and the submission of both parties to draw my own conclusions. From the record I observe first, that the charge was read out to the appellant in a language which he could speak and understand and the essential ingredients were explained to him. The appellant responded in Kiswahili language and the learned trial magistrate recorded the appellant's own words in reply as; **"it is true"** and entered a plea of guilty.

11. Second, the prosecutor stated the facts of the alleged offence whereupon the learned trial magistrate recorded the appellant's response as; **"The facts are correct."** The record does not show that the appellant disputed the facts or gave any other explanation that might be said to have rendered his plea equivocal. The learned trial magistrate recorded a conviction and proceeded to hear facts relevant to sentencing.

12. I also note that the appellant never raised the question of wrongful confinement or torture by police in the lower court. I find that these complaints are an afterthought meant only to exculpate him. This is especially in light of the mitigation earlier filed with the petition of appeal. The said mitigation forms part of his appeal record and must be considered alongside his grounds of appeal and the submissions from both parties.

13. In his mitigation the appellant stated that he pleaded guilty because he thought the offence was punishable by a fine. He submitted that incarceration was detrimental to his life; that the sentence was too harsh and excessive and should be substituted with a non-custodial one. He urged that he was totally remorseful and ashamed of the act and that the short stay in prison had taught him that crime does not pay. He promised that this would remain etched in his mind as long as he was of sound mind. At no time did he deny the offence or state that he did not understand the proceedings in the lower court.

14. I have thoroughly examined the record of the proceedings in the trial court and find that the desirable practice in plea taking as was set out in **<u>Adan v Rep [1973] EA</u>** was followed. A medical report from Nairobi Women hospital was produced in evidence and is on record. It

indicated that the child presented with hyperaemic labia minora, and her hymen was torn at 6, 9 and 3 o'clock positions. The medical report confirmed that she had been sexually assaulted. The conviction was therefore sound.

15. On the sentence the appellant was sentenced to serve life imprisonment. The sentence imposed was in accordance with the law in view of the age of the complainant, which was 7 years at the material time.

The appeal is therefore found to be lacking in merit and is dismissed in its entirety.

SIGNED DATED and **DELIVERED** in open court this **30th day** of **July 2014.**

L. A. ACHODE

JUDGE