



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.184 OF 2011

BETWEEN

DOUGLAS TUMBOSEWO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of the RM's court at Kilgoris in criminal case No.141 of 2011 dated and delivered on 29th August, 2011 by Hon.B.O. Ochieng, SRM)

JUDGMENT

1. The appellant herein Douglas Tumbosewo was charged in count I with defilement of a girl contrary to **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on diverse dates of 7th and 8th August 2011at [particulars withheld] in Transmara District within Narok County, he unlawfully penetrated his penis into the vagina of V.K , a girl aged 15 years.
2. In the alternative count the appellant was charged with Indecent Act with a girl contrary to **section 11 (1)** of the **Sexual Offences act No.3 of 2006**. The particulars of the alternative count were that on the diverse dates of 7th and 8th of August 2011 at [particulars withheld] in Transmara District within Narok County, he unlawfully and indecently assaulted V.K , a girl aged 15 years by touching her private parts.
3. The appellant pleaded guilty to the main charge when he appeared before the trial court on 29th August 2013.
4. The facts of the case were that between 7th and 8th August 2011 at [particulars withheld]Trading Centre, the complainant in the case being a girl aged 15 years old and a stardard 7 pupil at [particulars withheld] Primary school eloped with the appellant who had befriended her. The appellant took the complainant to[particulars withheld] where the two stayed together for 4 days as man and wife. Later on, they moved to [particulars withheld] area where they stayed for a while. Meantime, the complainant's parents reported the matter to the police who started looking for the appellant.
5. On 23rd November 2011, the appellant and the complainant were arrested from their hideout at [particulars withheld] area. While the appellant was taken to Lolgorian police station, the complainant was taken to the District Hospital for examination. A P3 form was filled and the same was produced in court as **P. Exhibit 1**.
6. Upon examination, the age of the complainant was found to be 13 years. The age assessment

- report was produced as **P. Exhibit 2**. Thereafter the appellant was arrested and charged with the offence to which he pleaded guilty.
7. The appellant was sentenced to 20 years imprisonment on the main count.
 8. Being aggrieved by both conviction and sentence, the appellant has moved this court to quash the conviction and set aside the sentence on the following home-made grounds:-
 1. *That the plea taken by the lower court was not unequivocal.*
 2. *That the court failed to appreciate that the complainant herein is the appellant's wife.*
 3. *That the appellant was not provided with witness statements before the hearing of the case, thereby his right to a fair trial was infringed.*
 4. *That the sentence of twenty (20) years imprisonment was illegal.*
 9. Reasons wherefore the appellant prays that the appeal be allowed, conviction quashed and sentence set aside; and the court to make such other orders as it deems fit and just to grant.
 10. At the hearing of the appeal, the appellant filed written submissions and highlighted the following points:-
 - a. *The plea was not unequivocal;*
 - b. *The appellant was not medically examined as to his fitness to stand trial;*
 - c. *The appellant's rights under Article 49 (1) (f) of the Constitution were violated for failure to arraign him before court within the stipulated 24 hours;*
 - d. *The appellant did not understand the charge to which he pleaded guilty in contravention of Article 50 (2) of the Constitution.*
 11. A comparison between the submissions and the grounds in the Petition Appeal show that the submissions on lack of medical evidence, contravention of Article 49 (1) (f) of the Constitution were not among the grounds raised in the petition of appeal. These submissions are therefore strange to the petition of appeal and shall not be considered by the court.
 12. The appeal was opposed. Mr. Majale, prosecuting counsel submitted that having been convicted on his own plea of guilty, the appellant can only plead against the extent or legality of the sentence and not the conviction. As to the extent of the sentence, counsel submitted that the sentence imposed upon the appellant was the maximum provided under **Section 8 (3) of the Sexual offences Act**.
 13. Further, counsel submitted that the appellant's contention that the complainant was his wife was not borne out by any evidence and that ignorance of the law was no defence to the appellant. Counsel urged the court to dismiss the appeal in its entirety.
 14. In reply, the appellant asked the court to remit his case to the lower court for retrial.
 15. This is a first appeal. On a first appeal, the appellate court is under an obligation to reconsider and evaluate the evidence afresh and to weigh and consider the judgment of the trial court. See **Okeno –vs- Republic [1972] EA 32** and **Pandya –vs- R[1957] EA 336**. The position in this case is slightly different in that what I have to consider is whether the appellant's plea before the trial court was unequivocal. In considering this issue, a number of cases come to mind, such as **Adan –vs- Republic [1973] EA 445**, **Boit –vs- Republic [2002] 1 KLR** and **Obanda –vs- Republic [1983] KLR 507**. The steps to be followed by a court in recording a plea of guilty were clearly set out in the **Adan case** (supra) and these are:-
 - 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 an 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 any relevant facts;**
 - iv. **if the accused does not agree with 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."**

16. The above steps apply to all cases whether the offence be a simple one or a more serious one like the one which faced the appellant in this case. The question that must be determined by this court is whether from the record, the court followed those steps in entering the plea of guilty against which the appellant now appeals.

17. I have carefully examined the record and I am satisfied that the court followed all the steps as laid down in the Adan case. When the appellant appeared before court on 29th August 2011 and the charges were read out to him he stated:-

“It is true I never understood both charges. Please read them out to me. I understand Kisii.”

The trial court then directed that the charges be read out to the accused in Kisii Language. Once the charge was read out to him again in Kisii Language he stated: It is true.” and after the prosecutor read out the facts of the case, the appellant stated:

“The facts are true. I married her. She is my wife.”

On mitigation the appellant stated:

“--- I should not have married an underage. She is my wife. We had an understanding. She agree.”

18. In my considered view, there is nothing on record to suggest that the appellant did not understand what he was pleading guilty to. I am also satisfied that the trial court followed the correct procedure in entering the plea of guilty though the words **“it is true”** in answer to the charge when first read out to him are not usually considered adequate if what follows is not comprehensive enough. I am in agreement with counsel for the Respondent that the conviction would be safe if all other parameters would be in place. This ground of appeal therefore fails.

19. A close look at the particulars of the offence under the main count reveals a dichotomy between those particulars and the facts of the case in respect of the age of the complainant. The charge sheet shows that the age of the complainant was 15 years, but the facts show that the complainant was aged 13 years. It is not clear to this court whether the appellant pleaded guilty to the charge which gave the age of the complainant as 15 years or to the facts of the case which indicated the age of the appellant as 13 years.

20. The law relating to charge sheets is that an accused person should plead to a charge that is clearly stated in a language that causes no ambiguity and in a case like the present one, the facts to which an accused pleads must be in tandem with the particulars of the charge sheet.

21. In the instant case, the question to be asked by this court is whether the dichotomy in the age of the complainant caused any prejudice to the appellant. In my humble view, it did not because the appellant was emphatic on being asked whether the facts were true that the complainant was his wife and that he had married her with her own consent. Further, there was no prejudice in terms of the sentence because **section 8 (3)** is the sentencing section where the complainants are aged between twelve and fifteen years.

22. Accordingly, I am satisfied that the plea in this case was unequivocal, the feigned ignorance of the appellant notwithstanding. It is trite law that, ignorance is no defence in law.

23. The last issue to be considered by this court is whether the sentence meted out by the trial court was illegal. The answer to this contention by the appellant is that the sentence was neither illegal nor unlawful. The law provides under section 8 (3) that –

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

24. Twenty years is the sentence that was meted out to the appellant. The same was both legal and lawful. The ground of appeal on sentence is therefore dismissed.

25. The appellant has asked for a retrial, but in my view there is no basis for such a plea. The

appellant pleaded guilty to the charge under very clear circumstances and confirmed to the court after the facts had been read that the complainant was his wife.
26. For the above reasons, I find no merit in this appeal which is hereby dismissed in its entirety. R/A to Court of Appeal within the next 14 days
27. Orders accordingly.

Dated and delivered at Kisii this 27th day of September, 2013

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Present in person for the Appellant

Miss Cheruiyot for the Respondent

Mr. - Court Clerk