REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 191 OF 2012

IGNATIOUS KIBIWOTT KITUR::::::::::::::::::::::::::::::::APPELLANT

VERSUS

REPUBLIC::: RESPONDENT

JUDGEMENT

IGNATIOUS KIBIWOT KITUR, the appellant herein was convicted on his own plea of **"Guilty".**

He had been charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the offence were that on 2nd August, 2012, at [particulars withheld] Village within Nandi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of the complainant, T, who was 5 years old.

After conviction, the appellant was sentenced to Life Imprisonment.

In his appeal to the High Court, the appellant submitted that the plea was irregular.

He asserted that the charge was read out to him in Kiswahili, which is a language that he did not understand.

Mr. Sang, the Learned advocate for the appellant, submitted that the trial court ought to have found out whether or not the appellant understood Kiswahili, before reading out the charges.

The appellant told this court that he only understood the Nandi language.

As he did not understand Kiswahili, the appellant said he was unable to tell the trial court that he was barely 18 years old, by the time he was charged. Consequently, the appellant complains that the trial court handled him as if he was an adult.

I was invited to quash the conviction, and to direct that there be a retrial of the appellant.

Mr. Mulati, Learned State Counsel, opposed the appeal.

The Respondent submitted that the appellant had admitted both the charge and the facts which gave rise to the said charge. Therefore, the conviction was well-founded.

The Respondent further submitted that during mitigation, the appellant had every opportunity to inform the court about his age. His failure to do so, cannot be blamed on the prosecution or the trial court.

In reply to the submissions of the Respondent, the appellant insisted that the plea was irregular because the court had not recorded the exact answer that he had given.

I have given careful consideration to the record of the proceedings before the trial court. I have also taken into account the Grounds of Appeal, together with the submissions made before this court.

First, it is clear that in the Grounds of Appeal, the appellant never alluded to any issue regarding his young age.

Therefore, when he was canvasing his appeal, and introduced the issue regarding his alleged young age, the appellant was introducing something completely new. It was not open to him to do so, without first seeking and obtaining leave to amend his Grounds of Appeal.

By so holding, this court is not averse to the Constitutional requirement, that courts should not give undue regard to technicalities. I am fully alive to the need for substantive justice.

In this case, if the appellant was truly concerned about his age, he could have sought leave of the court to amend the Grounds of Appeal. In his application, he would have put forward evidence to demonstrate to the court, what his actual age was.

As matters stand currently, the court has absolutely no basis upon which to determine the legitimacy or otherwise of the appellant's alleged young age.

In the Grounds of Appeal, it had been asserted that the appellant had a problem with his ability to hear.

Indeed, he said that he wore a hearing implement, and may therefore have failed to:

“have properly heard and understood the notion of the charges against him.”

I understand that to mean that he was complaining about the quality of the sound rather than the language that was being spoken.

Therefore, the appellant's submissions before this court are not in conformity with his own Grounds of Appeal, to that extent.

However, there was also an express statement that the appellant did not understand the language in which the charge was read out to him.

The record of the proceedings shows that the charge was read and explained to the appellant in Kiswahili.

In answer to the charge, the appellant is recorded to have said:

“True.”

In an ideal situation, the answer given by an accused person, after the charge is read out to him, should be recorded in the exact manner as was stated by the accused. Thus, if an accused answered in Kiswahili, the record should reflect the Kiswahili word or words which he uttered.

However, it must also be appreciated that there will be instances in which an accused speaks in a language other than Kiswahili or English. Those two are the recognised official languages in Kenya.

If an accused answered in a language other than Kiswahili or English, the trial court would not be expected to record the answer in the language used by the accused.

The point I am making is that it is not necessarily fatal to the case of the prosecution, that the court did not record the answer in the exact language used by the accused when he was taking plea.

In this case, the prosecution set out detailed facts. The said facts indicated that on the material day, it was raining at about 4.30p.m, when the appellant met the complainant. The appellant persuaded the little irl, aged 5 years, to go into his house, because it was raining outside.

Once the girl entered the house, the appellant defiled her.

After the complainant was released, she informed her father that it is the appellant who had defiled her.

The complainant was examined at the Kabiyet Health Centre, within hours of the incident. It was established that the complainant had fresh bruises in her genitalia, and the said bruises were still bleeding.

The Clinical Officer who examined the complainant concluded that there had been penetration.

The appellant told the trial court that the facts were true.

It is then that the trial court convicted the appellant, based on his own plea of "Guilty".

When the appellant was asked to mitigate, before he could be sentenced, he asked the court to have mercy on him.

In effect, the appellant knew exactly what he was asked at every stage. When the charge was read, he said that it was true. Thereafter, when the facts were read out, the appellant said that the facts were true. And finally, when he was given an opportunity to mitigate, he asked the court to have mercy on him.

In the light of the foregoing, I have no doubt at all that the appellant understood what was being said to him, by the trial court.

In any event, if an accused person does not tell a court that he only understands a specific language, there is no way that the court could be expected to know that that was the position.

In this case, the appellant told this court that he only understood the Nandi language. But he did not give that information to the trial court.

Thus, apart from the finding, (above) that the appellant actually understood Kiswahili, I also find that it was wrong for the appellant to fault the trial court for not having read out the charge in the Nandi language, whereas the appellant had not informed the court that he needed a Nandi interpretor.

The appellant has told this court that he was barely 18 years old as at the time the offence was committed. That statement does not actually provide the court with information concerning the age of the appellant.

The age of an individual is a matter within his knowledge. Unless he relays the information to the court, there was no way that the court could become aware of that fact. Therefore, when an accused person fails to provide such information to the court, he cannot then turn around later, to blame the court for not taking that fact into account.

In the final analysis, I find no merit in the appeal. It is dismissed, and I uphold both the conviction and the sentence.

DATED, SIGNED and DELIVERED AT ELDORET

THIS 14TH DAY OF NOVEMBER, 2013

FRED A. OCHIENG

<u>JUDGE</u>