



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 195 OF 2011

KEPHA FURAHE WANGONGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

(Being an Appeal from the Original conviction and sentence of the Senior Resident Magistrate's Court at Kilgoris, Hon. J. Were in Kilgoris SRMCR Case No. 492 of 2010 dated 9th day of July, 2010)

The appellant herein **Kefa Furahe Wanongo** was charged with nine counts of defilement contrary to section 8(i) as read with section 8(2) of the **Sexual Offences Act** 2006. The particulars of the charge on count one were that on diverse dates between January, 2010 and June 2010 in Transmara District of Rift Valley Province, did cause his penis to penetrate the vagina of one, **N.A** a child aged 8 years.

These particulars are the same for count two to nine with a variation only of the names and ages of the victims of the offence. In all nine counts, the appellant faced an alternative charge of indecent act with a child contrary to section 11(i) of the **Sexual Offences Act** No. 3 of 2006.

The appellant pleaded guilty to the charge on all the nine counts and was convicted on his own plea of guilty on 9/7/2010 by **Hon. J. Were SRM**. He was sentenced to life imprisonment on each count. The sentences were to run concurrently.

The appellant has now appealed against both the conviction and sentence. In his application to this court

to appeal out of time, he swore an affidavit dated 31st May, 2011 stating that he intended to appeal against sentence only. The application was allowed on 20th September, 2011 by **Makhandia J.** who deemed the undated petition attached to the application for leave filed on 5th July, 2011 as duly filed. In that first petition of appeal, the appellant has stated that he pleaded guilty to the charge. He has also stated that the sentence imposed was excessive and that the trial court convicted him without warning him of the repercussions of his plea. His final ground is that the medical evidence tendered did not support the conviction.

The appellant subsequently filed another petition of appeal on 27th September 2011, in which he prayed for a retrial stating that he pleaded guilty out of ignorance. He also alleges that he was denied a right to a fair trial and prays for a retrial. Finally he has set out the ground that the sentence was overly harsh and excessive.

When the appeal came before me for hearing on 9th November 2011, the appellant told the court that he wanted a retrial on the basis that he did not follow the proceedings in the trial court. He stated that at the time of his trial his hearing was impaired and that the prosecutor and the complainant used a language he did not understand.

Mr. Mutai the learned state counsel opposed the appeal. He submitted that the appellant's plea of guilty was unequivocal and that the language used in trial court was Kiswahili which the appellant was using even in the present appellate proceedings. He referred to the appellant's mitigation to demonstrate that he had followed the proceedings. **Mr. Mutai** further submitted that the ingredients of the offence in each count was established and that the conviction was proper. On sentence, he submitted that the same was the only sentence provided by law.

I have reviewed and analyzed the proceedings in the lower court. From the record, the appellant was a watchman at the institution. The appellant was accused of defiling nine girls as follows:-

1st complainant – N. A, aged 8, std 4 pupil

2nd complainant – L. K, aged 8, std 4 pupil

3rd complainant – V. O, aged 7, std 1 pupil

4th complainant – V. B, aged 7, std 2 pupil

5th complainant – B. O, aged 3, in nursery school

6th complainant – C. S, aged 6, in nursery school

7th complainant – D. O, aged 7, std 1 pupil

8th complainant – E. V, aged 4, in nursery school

9th complainant – J. A, aged 6

From the record the appellant elected to use Kiswahili language. The proceedings of 9th September, 2010 when plea was taken indicates interpretation as English/ Kiswahili. The record indicates:

“The substance of the charge (s) and every element thereof has been stated by the court to the accused, in the language the he/she understands, who being asked whether he/she admits or denies the truth of the charge (s), replies”.

What follows is a reply by the accused *“It is true”* to each of the counts.

The record further reflects that the prosecutor read the facts of the case in each count and produced a P3 medical form and in respect of each of the complainants and the accused stated *“All the facts are true”*. The P3 form in respect of each complainant showed injuries to the minor complainants’ genitalia including obliterated hymen consistent with defilement. I therefore hold that the plea was unequivocal and the subsequent conviction was not only sound on the basis of the unequivocal plea but also on the medial evidence tendered to support the charge.

Further on the question of language, I am persuaded that the appellant did indeed participate actively in the proceedings as rightly pointed out by the state counsel. Before being sentenced he mitigated thus:-

“There was a force put in me by a witchdoctor. I seek to be prayed for to get deliverance. Pray to be forgiven”. (sic!)

The appellant has asked for a retrial. His reason for seeking a retrial is that he did not know that by pleading guilty he would get a life sentence. He has not demonstrated any act or omission in the trial proceedings that occasioned a failure of justice or made him suffer any prejudice. Indeed my perusal of

the record has not revealed any. This request is therefore without merit. One cannot be retried just because they wish to change their unequivocal plea.

Finally on the issue of sentence, the trial court meted out the only mandatory sentence under the law. The trial court had no discretion in the matter. It cannot therefore be said that the sentence was excessive.

In sum, this appeal lacks merit. The application for retrial (tucked in the appeal) is also without merit and I dismiss it. Consequently, I uphold the conviction and sentence of the lower court.

It is so ordered.

Judgment dated, signed and delivered at Kisii this 28th day of March, 2012.

R. LAGAT-KORIR

JUDGE

In the presence of:

Edwin Mongare/Bibu : Court clerk

..... : Appellant

.....: Counsel for the respondent