REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

Criminal Appeal 397 of 2010

JAMES NJUGUNA NDICHU ……..…..… APPELLANT

VERSUS

REPUBLIC ……..… RESPONDENT

(An Appeal from original conviction and sentence in Nyahururu P.M.CR.C. No.2768 of 2010 by Hon. D.N. Musyoka, Resident Magistrate dated 15th October, 2010)

JUDGMENT

The appellant, **JAMES NJUGUNA NDICHU** was convicted on a charge of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006**. The prosecution case was that on 13th November 2010 at {*particulars withheld*} in Nyandarua Central District, Central Province, he intentionally and unlawfully caused his penis to penetrate the vagina of **N. W. R.** a child aged 6 years.

The appellant admitted the offence and the facts narrated to the trial court were that on 13th November 2010 at 9.00 a.m., the complainant's mother went to work at a nearby farm when she returned home at about 1.00 p.m., one **FRANCIS KIMANI NJUGUNA** informed her that the appellant had dragged the child into the worker's house and defiled her. The matter was reported to police and the child taken for treatment at OlKalou District Hospital. A P3 form in respect of the child was produced in court disclosed that the minor's right thigh was swollen and tender with erythema. The labia majora at the area of 12 o'clock was bruised and tender, and the hymen was perforated. The external genitalia was bloody.

The Doctor's conclusion was thus:-

"There is obvious evidence of forceful penetration resulting to bruises of labia majora and penetration of hymen."

The appellant confirmed to the trial court that the facts were correct and had nothing to say in mitigation. The trial court took into account the age of the victim and that the appellant was not remorseful, so he ought to be kept away from children – he was thus sentenced to life imprisonment.

The appellant in his appeal alleges that he was threatened by the arresting officer to admit the offence, so he pleaded guilty out of fear. He complains that he was brought to court and convicted on the same day, thus denying him time to prepare adequately.

In conceding the appeal, Mr.Omari on behalf of the State submits that the plea was not taken properly and

did not meet the standards set out in **ADAN V R**, and the appellant was sentenced without being warned, so his rights were prejudiced.

I have perused the record, with regard to claims of torture and threats, I hold the view that appellant had an opportunity to raise such an issue before the trial magistrate and he did not do so. The trial court cannot be faulted for that.

As regards the manner in which the pleas was taken, the record shows that the charge was read to the appellant and interpretation was in Kiswahili and he answered:

"It is true."

At no point did he suggest to the trial court that he did not understand the language.

The facts were then narrated to him, and again he confirmed them to be correct. From this record, my view is that plea was properly taken and was unequivocal. However the State Counsel holds the view that the appellant ought to have been cautioned as to the weight of the sentence and the implication of his plea. He refers to the decision in **ADAN V R** 1973 EAR pg 445 which considered the manner in which plea ought to be recorded and the steps taken therein. These steps were sets as:

1. 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.

2. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

3. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain facts or to add any relevant facts.

4. If accused does not agree the facts or raises any question of his guilt, his reply must be recorded and change of plea entered.

5. 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.

To my mind, the trial court complied with all these steps. However I think it is in matters where the sentence is a mandatory, a court is required to caution an individual regarding the sentence, and the implication of a plea of guilty. I agree with the State Counsel that the manner in which the plea was taken was prejudicial to the appellant only to the extent that in view of the fact that the offence carries a mandatory life sentence, then the trial court ought to have cautioned the appellant. I take into account the nature of the offence and age of the victim, and in my view, the remedy does not lie in an acquittal but in a retrial.

I therefore quash the conviction and set aside the sentence. I direct that this matter be sent for retrial before a magistrate other than the one who heard this matter initially. The appellant shall appear before the Principal Magistrate's court at Nyahururu on 6th August 2012 for plea taking and trial directions.

Delivered and dated this 30th day of July, 2012 at Nakuru.

H.A. OMONDI

JUDGE