IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.195 OF 2010

MOSES KURIA NJUGUNA………...…………APPELLANT

VERSUS

REPUBLIC…………………………...………….PROSECUTOR

(An Appeal from original conviction and sentence in Nyahururu SNR. P.M.CR.C.NO.1611/2010 by Hon T. M. Matheka, Principal Magistrate, dated 7th June, 2010)

JUDGMENT

The appellant, Moses Kuria Njuguna, pleaded guilty to two counts of **defilement of a girl** contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act No.3 of 2006.**

Facts were narrated to the effect that on 5th June, 2010 at around 1700 HRS at K[....] Trading Centre in Nyandarua West District, the appellant lured the two complainants, AWM and AWN, both girls aged 8 years to a building under construction where he ordered them to remove their undergarments and defiled them, in turns. The complainants cried and their respective mothers who were within the vicinity together with members of the public responded, the appellant pursued and arrested at a local market. The complainants were examined by a medical officer who concluded in each case that the acts committed upon the complainants constituted penetration as their hymens were broken. The appellant was subsequently charged as aforesaid.

After pleading guilty to the two charges and upon conviction, the appellant was sentenced to life imprisonment. He was also declared under **section 39** a dangerous person and ordered to be placed under a 5 year supervision should he be released at any stage.

The appellant being aggrieved brought this appeal on the grounds that he did not understand the language used at the trial and that the plea was not unequivocal. The appeal was oppose by counsel for the respondent who submitted that the plea was unequivocal; that the language used was shown and must have been understood by the appellant in view of what he stated as he pleaded and in mitigation. It was further argued by counsel that in terms of **section 348** of the **Criminal Procedure Code** an appeal from a conviction of guilty plea can only be brought on the grounds of severity and legality of sentence. Counsel submitted that the sentence imposed was that provided by the law and was neither illegal nor severe.

I have in deciding this appeal considered these submissions as well as the authority of **Mbungo** Vs. **Republic** (1983) KLR 348 cited by learned counsel for the appellant on the issue of recording a plea of guilty by the trial courts. The court (Todd, J) in that case also cited with approval the old but leading case of **Republic** Vs. **Yekoyasi Okedi s/o Akagye** (1944) ll EACA 110 and **Hando s/o Akunaay** Vs.

Republic (1951) 18 EACA 308. In the former, the court said:

"The actual words used by an accused in pleading guilty to a charge should be recorded verbatim but of course translated into English."

Similar view was later expressed in the latter case where the law was stated as follows:
"Before convicting on any such plea of guilty it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent."

In other words the trial court must satisfy itself that the accused person fully understands the details of the charge and has unconditionally admitted the same.

For instance, the charges in this matter being defilement of a girl it was the duty of the trial court to explain to the appellant that he committed a sexual act with the complainants which caused penetration, partial or complete insertion of his genital organ into the complainants' genital organs; that the complainants were persons aged below eleven years; and that upon conviction he was liable to imprisonment for life.

The trial court must ensure that these ingredients are explained in a language understood by the accused person. Trial courts must take their time in this exercise. It is the foundation of a trial due to its importance as reflected in the Constitution (present and repealed) and in the Criminal Procedure Code. The record in the matter before me reflects the usual haste and mechanical approach by many trial courts. For instance, it is recorded simply that the substance of the charge and every element thereof were explained to the appellant in a language that he understood without specifying that language. It is, however, indicated that he replied in Kiswahili. Secondly, the record is clear that the court clerk (Nyaga) conducted interpretation from English to Kiswahili (that is what I make of English/Kiswahili); and finally the appellant in response to the narrated facts answered:
"The facts are correct."

In mitigation, the appellant reiterate:
"I did it. I have nothing else to say."

"I did it" can only be in relation to the act of defilement of the complainants as explained in the narration of the facts.

It cannot, therefore be true that the appellant could only understand and communicate in the Kikuyu language. Indeed any judicial officer who has been engaged in criminal trials will tell you that it becomes immediately apparent when an accused person is unable to understand or communication in either Kiswahili or English.

I cannot see how a professional magistrate and a trained prosecutor can proceed as reflected in this record – from plea – facts mitigation and sentence when the person (the appellant) before them cannot follow the proceedings.

I find no merit in the allegation that the appellant did not understand Kiswahili. There are no grounds to warrant my interference with the learned trial magistrate's finding, save to note that her order for five years supervision of the appellant was erroneous. It does not comply with **section 39(1)** of the **Sexual Offences Act** which requires, among other things, that no order for supervision will be made unless there is a report by a probation officer or social worker. No such report was tendered before the trial court, hence no supervision order could be imposed.

The second observation is with regard to the sentence. The court sentenced the appellant to *"life sentence on each count."* It was sufficient to pass sentence on only one count and hold the sentence on the second

count in abeyance as one has only one life.

The final thing I would like to state is with regard to the submissions in respect of **section 348** of the **Criminal Procedure Code.** Although the section provides that no appeal shall be allowed from a conviction arising from a plea of guilty, except as to the extent or legality of the sentence, it is now settled that that provision is not a complete bar to an appellant to bring an appeal on any other ground (s).

To the extent that the supervision order is set aside and the sentence in the second count ordered to be held in abeyance, this appeal fails and is dismissed.

Dated, Delivered and Signed at Nakuru this 23rd day of February, 2011.

W. OUKO
JUDGE