



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Criminal Appeal 50 of 2009

LUCAS JOHN NYAMOHANGA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(From original conviction and sentence by the Resident Magistrate's Court at Kehancha P & C case no. 5 of 2009 by J.R.Ndururi(RM))

This is an appeal against the conviction and sentence of two years imprisonment imposed on the appellant by the Resident Magistrate's court at Kehancha-J.R Ndururi, presiding on 10th March, 2009, for the offence of sexual exploitation of a child contrary to section 15 of the **Children Act**. The appellant when arraigned before the court as aforesaid pleaded guilty to the charge. He was accordingly found guilty on his own plea of guilty, convicted and sentenced as aforesaid.

The material facts to the somewhat limited extent to which they have been proved or admitted are simple and can shortly be stated thus in the words of the prosecutor when he gave the facts upon the appellant entering a plea of guilty:-

“Between 12/2/2009 and 6/3/2009, the subject in this case who is a pupil at K primary school in class 6 left school and disappeared. The parent J.S.C searched for her and found her in the home of the accused person who had purported to marry her. Complainant informed accused's parents that the subject was 15 years and in school but they barred her from collecting her. He reported to area chief and they rescued the subject and arrested accused. Matter was taken to DCO who investigated the mater and referred to the police. He took the subject for age assessment and was assessed at 15 years. Accused is aged between 20-24 years of age. It was also found that the subject is now expectant. I produce the age assessment report on accused (PMF.1), treatment notes on the subject where pregnancy test was done(PMFI,2) and Child Health Card for the subject (PMFI.3). I produce them as P.exh.1, 2 and 3 respectively. Accused was then charged in this court.....”

Upon conviction and sentence aforesaid, the appellant lodged the instant appeal through **Messrs Kaburi Henry &**

Company Advocates. The appellant impugned the decision of the learned magistrate on six grounds to wit:-

- Ø *The learned trial magistrate erred in law and in fact in entertaining, proceedings with and conviction (sic) and appellant on the basis of the charge, which was patently and/or inherently unconstitutional. Consequently, the proceedings, conviction and sentence of the appellant contravene section 72(3) of the Constitution of the Republic of Kenya.*
- Ø *The learned trial magistrate erred in law and in fact in believing and acting upon, the prosecution's facts without assigning any credible and/or reasonable basis, for so doing.*
- Ø *The learned trial magistrate erred in law and in fact in entering a plea of guilty when the appellant stated that the complainant was his wife which clearly means he denied the offence of sexual exploitation*
- Ø *The learned trial magistrate erred in law and in fact in failing to note that the plea was not unequivocal and the appellant did not understand what he was pleading to*
- Ø *The learned trial magistrate erred in law and in fact in failing to set out the issues for determination, the determination thereof and the reasons for such determination. Consequently, the sentence of the learned trial magistrate was/is colored, (sic) with bias and/or error.*
- Ø *The learned magistrate failed to consider the appellant's mitigation and thus meted out a sentence which was/is manifestly excessive, in the circumstances of the case.*

When the appeal came up for hearing, the state through **Mr. Gitonga** learned state counsel conceded to the same on the grounds that the sentence imposed was illegal and secondly, the plea of guilty entered was not unequivocal. **Mr. Kaburi**, learned counsel for the appellant supported the position taken by **Mr. Gitonga**.

Having given the appeal, the submissions and the law full consideration, I am satisfied that **Mr. Gitonga** was right in conceding the appeal on the above grounds.

The appellant was charged under section 15 of the **Children Act**. That section provides that “.....*A child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity and exposure to obscene materials....*” On the face of it this provision does not perse create an offence. It only safeguards the rights and welfare of the child. However this right is turned into an offence by the provisions of section 20 of the **Children Act** which is to the effect that:-

“Notwithstanding penalties contained in any other law, where any person willfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in section 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or a fine not exceeding fifty thousand shillings or to both such imprisonment and fine.”

The charge sheet ought therefore to have read sexual exploitation to a child contrary to section 15 as read with section 20 of the children Act.

Further section 20 of the children Act is very clear. Upon conviction of the offence, the person so convicted is liable to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine. In this case however, the learned magistrate sentenced the appellant to 2 years imprisonment. This clearly is an illegal sentence since the maximum sentence of imprisonment permissible by the statute is one year.

How is a plea taken in a criminal case? The essential steps in the exercise were set out by the court of appeal for East Africa way back in 1973 in the case of **Adan .V.Republic (1973) E.A.445**. The steps are as follows:-

- (i) The charge and all essential ingredients of the offence must first be read and explained to the accused in his language or in a language he understands best.
- (ii) The accused's own words in response should be recorded and if they amount to an admission, a plea of guilty should be recorded;
- (iii) The prosecution should then immediately state the facts forming the basis of their case and the accused should then be given an opportunity to dispute or explain the facts or to add any other 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 the sentence together with the accused's reply should be recorded; and finally,
- (vi) The sentence.

All was well with the learned magistrate until he got to requirement (IV) above. When the appellant was called upon to admit or dispute the facts as narrated by the prosecutor, he is recorded as saying “.....***Yes I married the subject in this case. Her parents came to collect dowry and that is where a disagreement started....***” From this it is apparent that the appellant was disputing the facts. Infact he did not at all admit to the facts as narrated by the prosecution. In terms of requirement (IV) above, the learned magistrate ought to have automatically entered a plea of not guilty once the appellant stated that he had married the complainant and the only disagreement was about dowry. In a nutshell the appellant's plea of guilty and on which the trial magistrate proceeded to convict him was equivocal instead of being unequivocal. A conviction on guilty plea must rest on a plea of guilty that is unequivocal. That was not the case here.

In the premises the conviction cannot safely be allowed to stand. I would have been inclined to order a retrial, but as the appellant has already served more than half of the prison term imposed, I feel that such an order may lead to grave injustice, if the appellant should ultimately be acquitted. In any event I did not hear the learned state counsel plead for the same. Accordingly I allow the appeal, quash the conviction and set aside the sentence of two years imposed on the appellant. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kisii this 24th March, 2010.

ASIKE –MAKHANDIA

JUDGE