REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA Criminal Appeal 154 of 2008

ERICK NYAE .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

****

JUDGEMENT

The Appellant Erick Nyae has filed this first appeal against the conviction and sentence imposed upon him by the learned Chief Magistrate on 29/10/2007. The Appellant appeared in person and relied wholly on his written submissions in support of his appeal. Mr. Ondari Senior State Counsel appeared for the Respondent and opposed the appeal.

The record from the lower court indicates that the Appellant was charged before the Chief Magistrate with the offence of Indecent Act with a Child contrary to Section 11(1) Sexual Offences Act No. 3 of 2006. Upon the reading of the charge the Appellant entered a plea of guilty. The facts were then read out to him which he accepted. The Appellant was then convicted on his own plea of guilty and was sentenced to serve then (10) years in prison.

In his written submissions the Appellant raises four main grounds of appeal as follows:-

(i) That the charge was not read out to him in a language he understood as is required by law.

(ii) That he was cajoled by the police into pleading guilty upon a promise that he would then be granted a non-custodial sentence

(iii) That for such a serious offence the trial magistrate ought to have allowed the appellant 14 days to rethink the matter before recording a final plea of guilty

(iv) That the sentence which was imposed was harsh and excessive in the circumstances.

On his part Mr. Ondari for the Respondent argues that the Appellants plea was properly taken and that the sentence of ten (10) years is one provided for by law.

At the outset this court wishes to observe that the trial magistrate did properly follow the laid down procedure in recording the guilty plea. At no time does the Appellant deny having pleaded guilty to the charge. Once the guilty plea was entered the facts were read out to the Appellant. He accepted those facts as true whereupon the learned trial magistrate convicted him. The Appellant was certified by the court prosecutor to be a first offender. He was called upon to mitigate which he did and thereafter the

learned magistrate imposed the sentence. This court is unable to find any fault in the manner in which the plea was taken.

The Appellant appeals on the basis that the charge was read out to him in a language which he did not understand. S. 198(1) of the Criminal Procedure Code provides that:-

"*198(1) whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands"*

To my mind S. 198(1) is equally applicable to the reading out of a charge. The charge and its contents must be read out to the accused in a language which he understands. The languages of the courts in Kenya are English and Kiswahili as these are the two languages commonly spoken and understood by a wide section of the population. In the case of Aden –vs- Republic 1973 E.A. 445 it was held that:-

"*When a person is charged the charge and the particulars should be read out to him so far as possible in his own language which he can speak and understand"*

In his written submissions the Appellants indicates that he does not understand English but that he is fluent in Kiswahili. At page 1 of the record it is indicated that the interpretation was English-Kiswahili. Therefore the charge though written in English was interpreted for the accused into Kiswahili a language which he understood well. Indeed upon being read the charge the Appellant replied –

"*That is true I indecently assaulted her"*

The Appellant would not have been able to give such a clear and unequivocal reply if he did not understand the charge. The record clearly indicates contrary to the Appellants claim that the proceedings were infact translated into Kiswahili for the benefit of the Appellant. The court therefore rejects this ground of the appeal.

The Appellants second ground of appeal is that he was cajoled into pleading guilty by a promise made to him by the police that if he did so he would be given a non-custodial sentence. At no time did the Appellant raise this issue before the lower court either before or after his sentence. The Appellant has not given the names of the officers who made him such a promise. More importantly there is no allegation by the Appellant that any court official, a court clerk, the prosecutor or even the trial magistrate made him such a promise. The fact that the Appellant is only now raising this claim upon appeal convinces this court that this is a mere afterthought in an attempt to disown his guilty plea. The court rejects this ground of the appeal and finds that the Appellant voluntarily pleaded guilty to the charge.

Thirdly the Appellant claims that the trial magistrate after recording his plea of guilty ought to have returned him to the cells and re-called him after 14 days to confirm the guilty plea. There is no section of statute law that requires this of a trial magistrate. S. 207(2) of the Criminal Procedure Code provides as follows:-

"*(2) If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary"*

The trial magistrate did exactly this and recorded the exact words used by the Appellant in admitting the charge which were –

"*It is true I indecently assaulted her"*

Section 207(2) goes on to state that –

"*provided that after conviction and before passing sentence or making any order the court may permit the complainant to outline to the court the facts upon which the charge is founded"*

Once again this provision was followed to the letter by the learned trial magistrate. The complainant (in this case the court-prosecutor) did read out the facts of the case to which the accused responded

"That is true"

Thereby confirming his plea of guilty by admitting the facts as read out to him. In my view the trial magistrate properly followed procedure and accorded the Appellant due process. The Appellants guilty plea was unequivocal. The law makes no requirement that he be allowed fourteen (or any number of days) to ponder over his plea. This ground of the appeal is found to have no merit and is accordingly dismissed.

Lastly the Appellant argues that the ten (10) year sentence imposed on him was harsh and excessive. The Appellant was charged with Indecent Assault on a Child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 which provides:-

"*11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years"*

This section clearly provides the sentence to be imposed upon any person convicted of an offence under S.11(1). The sentence shall be for a term of "*not less than ten years"*. As such the learned magistrate was obliged to follow this section. He could not impose a sentence of less than ten years but he was at liberty to impose a sentence of more than ten years. As it is the learned trial magistrate imposed upon the Appellant the lowest sentence possible for this offence. More importantly this sentence was one provided for by law. This court notes that the victim was a child of tender years (10 years old). The sentence is in keeping with the governments determination to protect children from all forms of exploitation and abuse. In my view it is neither harsh nor excessive. As such the court dismisses the Appellants appeal against sentence.

Finally this court finds that the Appellants appeal is totally lacking in merit. It is hereby dismissed in its entirety. The conviction and sentence of the lower court is hereby confirmed.

Dated and delivered in Mombasa this 28th day of July 2009.

M. ODERO

JUDGE

Read in open court in the presence of:

Appellant in person

Mr. Onserio for State

M. ODERO

JUDGE

28.7.2009