

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 244 OF 2004**

J.K.C.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence of the Principal Magistrate's Court at Kericho in Criminal Case No.3061 of 2004 – B. Ojoo [R.M.]

JUDGMENT

The appellant, JKC was charged with the offence of **Defilement of a girl contrary to Section 145(1)** of the **Penal Code**. The particulars of the offence were that on diverse dates between the 19th and 20th June 2004 at Changoi Estate in Kericho District, the appellant unlawfully had carnal knowledge of P. C. G, a girl under the age of 16 years. The appellant was alternatively charged with the offence of **indecent assault on a female contrary to Section 144(1)** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the appellant unlawfully and indecently assaulted P.C.G, a girl under the age of 16 years by touching her private parts. The appellant pleaded guilty to the charge. He was convicted on his own plea of guilty. He was sentenced to serve twenty years imprisonment. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the appellant raised four grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted on a plea of guilty whereas the trial magistrate had failed to ascertain if the appellant understood the language which the plea was taken. He was aggrieved that he had been convicted on a plea of guilty in the absence of the substance of the charge being explained to him. He faulted the trial magistrate for convicting him on a plea of guilty that was equivocal. He was finally aggrieved that he had been sentenced to serve a custodial sentence that was excessive in the circumstances.

During the hearing of the appeal, the appellant, with the leave of the court, presented to the court written submissions in support of his appeal. In the said written submissions, the appellant stated that he neither understood English or Kiswahili, the language which appears on record as the one which plea was taken. He submitted that he was convicted on a plea of guilty that was vitiated by the fact that he had not understood the language in which the plea was taken. He denied that he had committed the offence. He attributed his lack of understanding of the charge to the fact that the person who interpreted the charge to him did not explain to him the nature of the offence that he was then facing. He urged the court to favourably consider his appeal, quash the conviction and set aside the sentence.

Mr. Mugambi for the State opposed the appeal. He submitted that the appellant was convicted on his own plea of guilty which was unequivocal. He urged this court not to interfere with the sentence that was imposed by the trial magistrate because the said sentence was legal. He submitted that the trial magistrate had taken into account all the facts and the circumstances of the case before she arrived at the decision sentencing the appellant to serve a custodial sentence. He urged the court to dismiss the appeal and uphold the conviction and sentence of the trial magistrate.

This being a first appeal, this court is mandated to re-evaluate and re-consider the evidence adduced in the trial before the magistrate's court so as to reach its independent determination whether or not to uphold the conviction. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore could not make any finding as regard the demeanour of witnesses (*See **Okeno –vs- Republic [1972] E.A. 32***). The issue for determination by

this court is whether the prosecution proved its case on the charge of defilement against the appellant to the required standard of proof beyond reasonable doubt.

In the present appeal, the appellant was convicted on his own plea of guilty. He however submitted that the said plea of guilty was equivocal since he did not understand the language which the plea was taken. He further submitted that the language used by the court when the plea was taken was English and Kiswahili. He maintained that he neither understood English or Kiswahili to enable him follow the proceedings before the trial magistrate's court. He denied that he had committed the offence which he was charged and convicted. I have perused the record of the subordinate court. It is clear from the said record that the charge was read and explained to the appellant in Kipsigis language. When the appellant was asked to plead to the charge, he answered as follows;

“It is true. I slept with her and had sex with her.”

After the facts in support of the particulars of the offence were explained to the appellant he answered that;

“It is true I had sex with the complainant.”

When the time came for the appellant to mitigate, he told the court that he was remorseful and would not repeat such offence again. It was clear from the foregoing that the appellant understood the charge. He also understood the facts in support of the charge when the same was read over to him. He confirmed that he had sexual intercourse with the complainant. The complainant in this case was a girl then aged eleven years.

Having carefully evaluated the record of the lower court, I am not persuaded by the appellant's argument that the plea which was taken and which he pleaded guilty to was equivocal. The trial magistrate in the case took into consideration the safeguards put in place under **Section 207** of the **Criminal Procedure Code** and the procedure laid down by the Court of Appeal in **Adan vs Republic [1973] EA 445**. The plea was taken in Kipsigis language. The appellant was obviously asked what language he understood before the plea was taken. The appellant must have told the trial magistrate that he understood the Kipsigis language hence the decision by the trial magistrate to have the plea taken in Kipsigis language. From the nature of the reply made by the appellant, it was clear that he understood the charge that he was facing. He also confirmed the facts when they were read to him. I hold that the plea that was taken by the trial magistrate was therefore unequivocal. I find no merit on the grounds of appeal put forward by the appellant in support of his appeal against conviction. The appeal against conviction is hereby dismissed.

On sentence, the appellant was sentenced to serve twenty years imprisonment. He complained that the said sentence was harsh and excessive in the circumstances. Taking into consideration that the victim of the crime was eleven years at the time, this court is of the view that the said custodial sentence fitted the crime. I have seen nothing on the record to make this court interfere with the exercise of discretion by the trial magistrate when she sentenced the appellant. I will not interfere with the said sentence. The appellant is lucky that he was not charged after the commencement of the **Sexual Offences Act**. Under **Section 8(2)** of the said **Act**, the appellant would have been sentenced to serve life imprisonment. In the premises therefore, I find no merit with the appellant's appeal against sentence. His appeal on sentence is similarly dismissed.

The upshot of the above reasons is that the appeal on conviction and sentence is dismissed. The conviction and sentence of the trial magistrate is hereby upheld.

It is so ordered.

DATED at Nakuru this 14th day of December 2007

L. KIMARU

JUDGE