REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: A.K. NDUNG'U J.)

CRIMINAL APPEAL NO. 1 OF 2020

VICTOR KIPLANGAT MUTAI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. D.K. Matutu (P.M.) delivered on 19th August 2019inKilgoris S.O. No. 33 of 2019)

JUDGEMENT

1. VICTOR KIPLANGAT MUTAI, the appellant in this matter was charged with defilement contrary to **section 8(1) 4** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that on diverse dates between the month of August 2017 and 17th August 2019 at [Particulars Withheld] Village in Trans-mara East Sub-County within Narok County, he intentionally caused his penis to penetrate the vagina of YC a child aged 17 years. He faced an alternative charge of committing indecent act with a child contrary to Section 11(1) of the Sexual Offences Act based on the same particulars.

2. The trial court record shows that the charges were read to the appellant and he admitted the truth of the charges. The appellant also accepted the summary of the facts of the case as given by the prosecution, after which he was convicted on his own plea of guilty and sentenced to 10 years' imprisonment.

3. Aggrieved by the trial court's decision, the appellant filed this appeal contesting his conviction and sentence. In his Petition of Appeal, the appellant contended that the trial court did not consider his testimony and purely relied on the fabricated evidence of PW1. He also averred that the person who reported the matter was a person with whom he had had a long standing grudge concerning his marriage to the minor and that the minor's parents were also bitter about his arrest. He stated that he had not been given enough time to call them to testify in the matter and maintained that he did not commit the offence.

4. In his written submissions, the appellant added that the age assessment form supplied by the prosecution proved that the minor was 18 years. He stated that he got married to PW1 because she had told him that she was already 18. He also urged the court to disregard his grounds of appeal and instead lessen the sentence of 10 years because he was remorseful and had rehabilitated.

5. Counsel for the state opposed the appeal in his oral submissions before this court. He argued that the appellant was convicted on his own plea of guilt and under **Section 348** of the **Criminal Procedure Code** no appeal was allowed where an accused pleaded guilty except if the sentence was illegal. In this case, counsel urged, the appeal was not merited as the sentence was legal.

6. Section 348 of the **Criminal Procedure Code** does prohibit appeals against a plea of guilty. It stipulates:

> *"**348.** No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."*

7. The Court in ***Olel V Republic (1989) KLR 444*** interpreted the above provision as follows:

> *"Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (Cap 75) does not merely limit the right of appeal in such cases but bars it completely."*

8. The plea taking process was laid out in the case of **Adan v Republic(1973) EA 445 at 446** thus:

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts* which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."

9. The plea in this case was taken in English/ Kiswahili. The main charge was read to the appellant and when asked whether he admitted or denied the truth of the charge he replied *"It is true."* The prosecution then read the following facts to the appellant:

> *"Prosecution- between August 2017 and 17/8/19 the accused met the complainant a school going child. He persuaded her into relationship of love. They had sexual intercourse on numerous occasions. The accused knew the complainant was in class six (6) at "K" primary school. Around 29/6/19 the accused married the complainant moved in together as husband and wife. Police officers were tipped off. On 16/8/19 they managed to arrest the accused together with the complainant in one house. Were escorted to Olochorosei Medical Centre. PRC Form was filled. We produce the form as P EXH 1.*
>
> *P3 as PEXH 2*
>
> *Treatment notes PEXH 3*
>
> *Age Assessment Form P EXH4."*

10. When the above facts were read to him, he replied: *"The facts are true."*

11. In his petition of appeal, the appellant stated that he had pleaded not guilty at trial and that the trial court did not consider his testimony and relied solely on the fabricated evidence of PW1. The record is however clear that he pleaded guilty to the charges and maintained his plea after the facts of the case had been read to him. Had the appellant wanted to challenge the age of the minor or any aspect of the prosecution's case, he had an opportunity to do so when the plea was taken. (See ***Henry Kerage Nyachoti v Republic Criminal Appeal 23 of 2015 [2020] eKLR***)

12. I note that the charge sheet erroneously indicated that the appellant had been charged for defilement contrary to Section 8 (1) 4. However, from the facts and the particulars in the charge sheet it is apparent that the intended provision was section 8(1) as read with section 8(4) of the Sexual Offences Act. However, that error did not prejudice the appellant and was curable under **Section 382** of the **Criminal Procedure Code** which provides:

> ***382.*** *Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*
>
> *Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.*

13. The record shows that the appellant's plea of guilty was unequivocal. An appeal can therefore not lie against his conviction.

14. That leads me to the next issue which is whether the sentence imposed on the appellant was illegal.

15. An appellate court will not easily disturb the trial court's discretion on sentence unless it is manifestly excessive or the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court is of the view that the sentence is heavy and that the appellate court might itself not have passed that sentence, that is not of itself sufficient grounds for interfering with the discretion of the trial court on sentence. (See ***Bernard Kimani Gacheru vs Republic [2002] eKLR)***

16. The Court of Appeal in several decisions including ***Evans Wanjala Wanyonyi vs Republic [2019] eKLR***, ***Christopher Ochieng vs R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011*** *and* ***Jared Koita Injiri vs R, Kisumu Criminal Appeal No. 93 of 2014*** has held that the sentences imposed under the Sexual Offences Act left no room for the exercise of discretion by a sentencing court and were therefore unconstitutional.

17. ***Section 8 (4)*** *of the* ***Sexual Offences Act*** provides that *"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."*

18. In imposing the sentence of 10 years, the trial court referred to the new developments in sentencing and did not appear shackled by the mandatory nature of the sentence of 15 years' imprisonment stipulated in Section 8 (4) above. It cannot be said that the sentence was manifestly excessive or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle in imposing the sentence. Consequently, I find no reason to interfere with the sentence.

19. The upshot is that this appeal is found to be lacking in merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KISII THIS 13TH DAY OF APRIL 2021.

A. K. NDUNG'U

JUDGE