



REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL NO. 9 OF 2018

DENNIS KARIUKI MBUGUA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. **Dennis Kariuki Mbugua**, the Appellant herein was charged with the offence of defilement contrary to **Section 8(1) (3) of the Sexual Offences Act No.3 of 2006**. The particulars of the charges were that on 12th April 2016 at [Particulars withheld] Village in Laikipia County he intentionally caused his genital organ namely penis to penetrate into the vagina of MWM, a girl aged 14 years. He also faced an alternative charge of committing an indecent act with the same child contrary to **Section 11 (1) of Sexual Offences Act**.

2. The Appellant was convicted of the main charge on his own plea of guilty and sentenced to 20 years' imprisonment. The Appellant despite being convicted on his own plea of guilty, was nonetheless aggrieved by both the conviction and sentence meted out against him by the trial court. His grounds of appeal as indicated in the petition of appeal include: -

- i. That, he pleaded guilty to the charge hence did not waste the court's time.*
- ii. That he was a first offender with a clean criminal record.*
- iii. That at the time of the arrest he was 19 years of age and a form three student at [Particulars Withheld] Secondary School.*
- iv. That he is half orphan and a first born in a family of four and his mother I physically disabled and unemployed.*
- v. That he was sentenced on the first day he appeared in court.*
- vi. That he was ill advised by the arresting officer that if he pleaded guilty he will be forgiven and the case will be set aside and due to lack of knowledge and being his first time in custody he pleaded guilty without knowing that it was a trick to prevent them from testifying in the case.*
- vii. That it was his first time in court and the trial magistrate could have been given him 14 days to consider what he was pleading guilty to.*
- viii. That the court should have called for a pre-sentence report to guide it.*
- ix. That the court did not warn him of the consequences of pleading guilty. Article 50(2) (b) of the Constitution requires that an accused person to be informed of the consequences of pleading guilty that is likely sentence that he forfeits his rights to full trial and that if plea is unequivocal he can only appeal on the legality and extent of the sentence. That was not done by the court which is a fatal omission on the part of the court.*
- x. That the sentence is too harsh and that he prays that it be set aside or reviewed and order for retry.*

ANALYSIS AND DETERMINATION:

3. The Appellant herein was charged and convicted on his own plea of guilty of the offence of defilement contrary **Section 8 (3) of Sexual Offences Act** which states;

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed

defilement.....

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

4. It is indisputable that the Appellant pleaded guilty to both the charge and the detailed particulars read over to him as per the proceedings of the trial court. The Appellant contends that he was ill advised by the arresting officer that if he pleaded guilty he will be forgiven and the case will be set aside and due to lack of knowledge and being his first time in custody he pleaded guilty without knowing that it was a trick to prevent them from testifying in the case. However, I have carefully gone through the proceedings and I did not find any evidence of coercion, interference or trickery by the investigating officer or any other person for that matter.

5. On 21st November, 2016 the accused appeared in court for plea. The proceedings as recorded were as hereunder: -

“The substance of the charge(s) and every element thereof has been stated by the court to the accused person in Kiswahili language that he/she understands who after being asked whether he/she admits or denies the truth of the charge(s):- replies in Kiswahili,

“Kweli”.

Alternative count

Si kweli

Plea of guilty entered

Betty- on 12/4/2016 at around 2.00pm the complainant in this case at [Particulars withheld] Village was sent by her mother to go fetch water. On her way back home, she met the accused person who pushed her down and pulled her into a nearby bush where he defiled her in the process the accused held her neck to prevent her making any noise. As a result, she sustained some bruises on the neck. The minor reported to her grandmother. Her grandmother reported to the police a Sipili. Accused was later arrested and charged with the offences before court today. P3 form was issued to the minor at Sipili- P. Exhibit-1.

Accused in Kiswahili

Ni kweli

A.P NDEGE

SENIOR RESIDENT MAGISTRATE

Court

Accused person convicted on his own plea of guilty in the main count.

Accused in Mitigation in Kiswahili

I want to be taken to a place where I will continue my studies. I am 20 years old.”

6. In John Muendo M. –vs- Republic [2013] eKLR, the court had this to say;

“The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of Adan vs Republic [1973] EA 445 where the Court held: -

- i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.**
- ii. The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.**
- iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any 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 facts relevant to sentence together with the accused’s reply should be recorded.”**

7. Further the Court of Appeal in the case of Obedi Kilonzo Kevevo - v - Republic [2015] eKLR stated as follows in relation to plea taking: -

“The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. The facts as read to the accused must disclose the offence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty, thereafter, the facts are narrated to the accused person and he/she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence. Otherwise, the plea is not unequivocal.”

8. From the foregoing, I find that the procedure for plea taking was followed by the trial court to the letter. The charge was read to the Appellant on 21st November, 2016 to which he replied, ‘*Ni kweli*’. The detailed particulars of the case were then read to him disclosing the offence to which he still responded, ‘*Kweli*’. The Appellant pleaded guilty on both charge and the facts and in my view the plea was unequivocal in every sense. Having pleaded guilty to the charge, **Section 348 of Criminal Procedure Code** precludes him from appealing on conviction.

9. The Appellant stated that that the court did not warn him of the consequences of pleading guilty. Nevertheless, there is no legal requirement for the trial court to caution an accused person pleading guilty unless the charge carries a mandatory death or life sentence. Where the offence attracts a heavy penalty for example a long custodial sentence such as this case, it may be advisable to caution the accused person but in my view a retrial cannot be ordered mainly on the basis of that omission.

10. From the petition of appeal, the Appellant appears to be appealing mainly on the sentence meted out by the trial court. The Appellant submitted that sentence is too harsh however in the circumstances I am satisfied with the trial court’s sentence of 20 years imprisonment which is in line with **Section 8(1) (3) of Sexual Offences Act which stipulates** that:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

11. The Supreme court case of **Muruatetu PETITION CASE NO 15 OF 015** has now clarified the extent of its application which is;

“The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;”

12. This was with reference to its holding that;

“The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.”

13. Unless and until the mandatory aspect of minimum sentence in the provisions of **Section 8(3) of the Sexual Offences Act** are declared unconstitutional or amended, the provisions remain the law. A constitutional case will have to be instituted challenging the constitutionality of the same provisions, thus this court has no mandate to interfere with the sentence imposed by the trial court.

14. This is so because there is a rebuttable presumption of law of statute or a provision thereof legality/constitutionality until it is declared invalid/unconstitutional. See **Mount Kenya Bottlers Limited & 3 Others vs. A.G & Others, [2012] eKLR**. I am satisfied that the sentence is the minimum prescribed by the law and there is no error on the part of the trial court in imposing the impugned sentence. Accordingly, the appeal is therefore dismissed. Thus court makes the following orders;

(i) The appeal on both conviction and sentence is dismissed and conviction upheld and sentence confirmed.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 6TH DAY OF OCTOBER, 2021.

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CHARLES KARIUKI

JUDGE