REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 6 OF 2020

ELIJAH KAMAU GACHINGIRI……..……APPELLANT

-VERSUS-

REPUBLIC……...…….RESPONDENT

(*From the original conviction and sentence by T. Matheka SRM in Nakuru criminal case no 117 of 2007)*

JUDGEMENT

1. The appellant, **Elijah Kamau Gachingiri**, was charged with the offense of **defilement contrary to section 8(1) as read with section 8(3) of the Sexual offense No. 3 of 2006**. The particulars are that on 13th May 2007 at Njoro township industrial area within Nakuru District in Rift Valley province accused unlawfully had sexual intercourse with GW a girl aged 4 years.

2. The appellant was convicted on his own plea of guilt. He is aggrieved by the conviction and sentence and filed this appeal on the following grounds:

a. That the learned trial magistrate erred in law when she entered a plea of guilt that was not unequivocal.

b. That, the learned trial magistrate erred in law when he misdirected himself on the principles and procedure of plea taking.

c. That the learned magistrate erred in law when she gave a sentence but failed to note that the appellant had not given his mitigation.

d. *That the sentence imposed was manifestly excessive and severe considering the circumstances of the case, the age of the offender, and the fact that he had no previous records*.

3. The appellant in submission restated grounds of appeal set out above and added that he was not accorded a fair hearing; that he was not informed of the consequence of waiving his trial right.

4. He submitted that the court failed to inquire into the language he understood and he was not allowed to respond to the elements of the charges read out to him. He cited the case of **David Nyogesa Okwatenge vs Republic**.

5. The appellant further submitted that the trial magistrate misdirected herself on the procedure of plea taking and failed to cautioned him and relied on the case of **Adan v Republic [1973] EA 445.**

6. The appellant further submitted that he was not allowed to mitigate contrary to **Section 216 and 329 of the Criminal Procedure Code** and cited the case of **Songo Mohamed Songo & Anor vs Republic criminal app No. 1 of 2013 (2015) eKLR**. He urged this court to quash the conviction and set aside the sentence and set him at liberty or issue other orders that deem fit.

7. The prosecution through state counsel **Ms. Rita Rotich** opposed the appeal and urged this court to give directions on the **Muruatetu case** and further submitted that the appellant failed to mitigate despite having been given the opportunity to do so. She submitted that the sentence was commensurate to the offence and submitted that the appellant was charged under **Section 8(2) of the Sexual Offenses Act** which provide for life imprisonment for persons who defile children below 11 years. She submitted that the child herein was injured and traumatized and the appellant was convicted on his own plea of guilt.

ANALYSIS AND DETERMINATION

8. I have considered ground of appeal, submissions herein and perused the trial court proceedings. What I find to be in issue is whether plea was unequivocal.

9. The law on plea taking is set out in **Section 207 of the Criminal Procedure Code Cap 75, Laws of Kenya** which provides that:

> **"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads guilty, not guilty, or guilty subject to a plea agreement.**
>
> **(2) If the accused person admits the truth of the charge otherwise than by a plea agreement, 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; provided that after conviction and before passing sentence or making any order, the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**
>
> **(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.**
>
> **(4) If the accused person refuses to plead; the court shall order a plea of not guilty to be entered for him.**
>
> **(5) If the accused pleads –**
>
> > **(a) that he has been previously convicted or acquitted on the same facts of the same offence or**
> >
> > **(b) that he has obtained the Presidential pardon for his offence the court shall first try whether the plea is true or not and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it fines that the plea is false the accused shall be required to plead to the charge."**

10. Further, the case of **Adan Vs Republic (1973) E. A 445** outlines the principles to be followed in plea taking, the court held as follows: -

> ***i.*** **The charge and all the essential ingredients of the offence should be explained to the accused in the 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 questions of his guilt, his reply must be recorded and the 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"**

11. From the trial court file, I note that the charge was read out to the appellant in Kiswahili language and he responded in Kiswahili "*ndivyo."* The court then proceeded to enter a plea of guilt; the particular were read out to him later in the day and the court proceeded to convict him on his own plea of guilt. The fact that the appellant responded in Kiswahili showed he understood Kiswahili and he therefore understood charges against him. The plea was therefore unequivocal.

12. Record of the lower court does not show that he was warned of the seriousness of the offence; whereas I do agree that in cases which attract harsh sentence the accused should be warned of the consequences of a conviction, what comes first is whether plea was an unequivocal, whether he understood the charges he is facing and responded to the affirmative. From the case of **Adan Vs Republic (1973) E. A 445** as shown in paragraph 10 above, failure to warn does not render the plea unequivocal. In my view, that is not a fatal omission in a situation where the accused is found to have understood the charges he is facing. In this case, the charge was read to accused and facts read later in the day and the accused had opportunity to explain himself in mitigation but he opted not to mitigate on being called upon to do so.

13. I also note that the appellant was sentenced in the year 2007 and he filed this appeal in the year 2020, a period of 13 years after sentence. In my view this appeal is an afterthought. The appellant clearly understood the charges he was facing and he knew what he meant when he responded in Kiswahili "*ndivyo*" meaning it is true. I see no merit in the appeal.

14. FINAL ORDERS

1) **Appeal is hereby dismissed**.

JUDGMENT dated, signed and delivered via zoom at **Nakuru**

This **17th day** of **November,** 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person