REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL APPEAL NO. 165 OF 2019

EDWARD NAMASAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[**An appeal arising from the conviction and sentence by Hon I. G Ruhu (R.M) in original Kimilili S.P.M Sexual Offence Case No. 108/2019 delivered on 22/10/2019]**

JUDGEMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offence Act, 2006. The facts were that that on the 26/9/2019 at [Particulars Withheld] area in Kimilili sub county within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of MMKJ a child aged 6 years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006. The facts being that on 26/9/2019 at [Particulars Withheld] village in Kimilili sub county within Bungoma County, intentionally and unlawfully did cause his penis to come into contact with the vagina of MMKJ a child aged 6 years.

2. The record of the trial court indicates that no trial took place since the appellant seems to have pleaded guilty to the charges and was thus convicted on his own plea of guilty. During the appellant's first court appearance on 1/10/2019 and upon the charge being read over to him in Kiswahili language which he understood, he pleaded guilty to the charges and pleaded to be pardoned and that he be killed if he repeats the offence. The trial magistrate thereafter ordered for a mental assessment to be done on the appellant which was duly conducted on 17/10/2019 with the findings being that the appellant was fit to stand trial. On 22/10/2019, the charges were again read to the appellant who pleaded guilty to the charges and further admitted the facts as read by the learned prosecutor whereupon an unequivocal plea of guilt was accordingly entered and the appellant thereby convicted. The appellant was subsequently sentenced to 30 years' imprisonment.

3. The appellant being dissatisfied by the conviction and sentence, lodged this appeal wherein he has raised the following grounds; -

a. That he is a firs8t time offender.

b. That he is remorseful.

c. That he was a layman who was enticed by the police to plead guilty to the charges.

d. That the learned trial magistrate erred by basing his conviction on the fabricated medical documents which linked the appellant to the offence.

The appellant also filed supplementary grounds of appeal on 18/10/2021 albeit without leave of court. The grounds are;

a. That the trial magistrate failed to consider that his plea of guilty was made under duress, fear, threat and being misinformed by the police contrary to articles 25(a), 49(1)(d) and 50(2)(4) hence a miscarriage of justice.

b. The trial magistrate failed to inform him of his rights to have an advocate at the state's expense in line with articles 49(1)(c), 50(2)(g)(h) despite substantial injustice that would occur.

c. That the maker of the mental assessment report was not summoned to testify contrary to section 77 of the former constitution.

d. That the charge sheet was incurably defective contrary to section 382 of the Criminal Procedure Code.

e. That the appellant's fundamental rights and freedoms were violated, denied, threatened and infringed contrary to articles 27, 29(d), 49(1)(d)(f) and 50(2)(p)(i)(j) of the constitution.

f. That the prosecution's evidence was contradictory and inconsistent contrary to section 165 of the Evidence Act.

g. That the thirty years' sentence is harsh and excessive contrary to section 329 of the Criminal Procedure Code and article 50(2)(p) as read with article 2 and 3 of the constitution.

4. The appeal was disposed of by way of written submissions. Both parties filed and the same are on record. The court has duly considered them.

5. Having carefully considered the record of the trial court as well as the grounds of appeal alongside the submissions, I find the issue for determination is whether the plea of guilty entered against the appellant was unequivocal.

6. This is a first appeal and the duty of the court is as was stated in ***Kiilu & Another vs. Republic [2005]1 KLR 174,*** where the duty was stated thus;

''An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.''

It is noted from the record that no trial took place since the appellant pleaded guilty to the charges and was thus convicted on his own plea of guilty. Appeals against sentence where an appellant pleaded guilty are governed by section 348 of the Criminal Procedure Code which states;

''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.''

This being the case, the court is barred from entertaining an appeal on the propriety of the conviction unless it is satisfied that the plea was equivocal.

Regarding the manner in which a plea of guilty is entered, iam guided by the celebrated case of ***Adan v Republic [1973] 1 EA 445*** where the court laid down the procedure of taking a plea as follows;

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 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 the facts relevant to sentence together with the accused's reply should be recorded.

The court is therefore duty bound to examine the record in a bid to satisfy itself that the plea was unequivocal. The record shows that when the charges were read out in Kiswahili, the appellant answered; ***Ni kweli.***

The record reads;

Substance of charge and every element hereof stated to the accused in Kiswahili and the gravity of the offence including the penalty also explained to the accused in Kiswahili…

The facts were then explained to him whereupon he answered ***"Maelezo ni kweli".***

As regards the reading out of facts to the accused, the Court of Appeal in ***Obedi Kilonzo Kevevo - v - Republic (2015) eKLR***, held: -

> **''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.''**

This court equally recognizes that the appellant was unrepresented and that he has raised an argument to the effect that he did not understand the implication of the plea of guilty. In ***Simon Gitau Kinene v Republic [2016] eKLR***, Ngugi J. while addressing the issue held;

> **''In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence…..To put it plainly, then, one may add that where an unrepresented accused person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the accused person understands the consequences of such a plea is heightened.''**

Even though the appellant faced a serious charge and was unrepresented, the record clearly showed that he understood the elements of the charge and pleaded guilty and sought for pardon from the court. This was someone who really owned up to his crime and was quite ready to atone for his transgressions as nothing emerged that he had a semblance of a defence unlike the circumstances obtaining in the above quoted case.

7. From an analysis of the record, I am satisfied that the appellant was seized of the requisite mental faculties to understand the charges that were before court. The direction by the trial court in ordering for a mental assessment to be conducted on the appellant was informed by the need for abundance of caution and was in conformity with the caution rendered by the decision in **Adan Vs R** (supra). The contention by the appellant that he was under duress is unsubstantiated. It matters not that the maker of the mental assessment report was not called to testify since the appellant had already pleaded guilty to the charge. In any case, the author of the mental assessment report is usually an expert in that field in which the courts take judicial notice of their expertise in the field of medicine. The appellant understood all the elements of the charge and there was no interference at all as he was given amble time to think through but he still pleaded guilty to the charge and further did not dispute the facts supporting the charge when they were read out to him.

I am satisfied that the procedures as laid down in the above stated legal provisions and case law were adhered to by the trial court. The trial court cannot be faulted for convicting the appellant on his own unequivocal plea of guilty. Consequently, I find all the grounds against conviction as lacking in merit and must be rejected out rightly.

8. On the issue of sentence imposed upon the appellant, section 8(2) of the Sexual Offences Act provides for life imprisonment. In this case, the appellant was sentenced to 30 years in prison. It is noted that the appellant tendered his mitigation where he pleaded for leniency and that he was a sickling. This mitigation was considered by the court. I particularly note that the victim of the offence was a child of extreme tender years and that the ordeal must have been traumatizing and painful to her and likely to traumatize and scar her life for a considerable period.

9. The objectives of sentencing as contained in the Judiciary Sentencing Policy Guidelines *inter alia* are retribution, deterrence and rehabilitation. There is need to deter the appellant from such uncouth behavior as well as rehabilitate him so he can be a productive citizen. A custodial sentence was appropriate in the circumstances as a form of rehabilitation since that is the best mode of sentence for such an offender. It is through rehabilitation that he is likely to be reformed. It is trite that sentencing is at the discretion of the trial court. The learned trial magistrate did consider the appellant's mitigation and arrived at a sentence of thirty (30) years' imprisonment. As the sentence imposed by statute is life imprisonment, I find the trial magistrate duly factored the appellant's mitigating circumstances. I find the sentence to be reasonable in the circumstances and ought not to be interfered with.

10. In the result, it is my finding that the appeal lacks merit. The same is dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 11TH THIS DAY OF NOVEMBER, 2021

D. KEMEI

JUDGE

<u>In the presence of</u>:

Edward Namasaka Appellant

Miss Omondi for Respondent

Kizito Court Assistant