



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J.

CRIMINAL APPEAL NO. 58 OF 2019

TOM NYAMBANEAPPELLANT

VERSUS

REPUBLIC through ODPP..... RESPONDENT

(An appeal from the conviction and sentence of Hon. R. Oanda, PM dated and delivered on the 12th day of July 2019 in the original PMCR (S.O)

No. 28 of 2019)

JUDGEMENT

1. The appellant was charged with defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of which were that on the 9/7/2019 in Narok County intentionally caused his penis to penetrate the vagina of NTR, a girl aged 10 years old.
2. He faced an alternative count of indecent assault with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. That on the 9/7/2019 at Transmara Sub County, intentionally caused his penis to come into contact with the vagina of NTR, a girl aged 10 years old.
3. The appellant appeared in court on 12/7/2019 for plea and was convicted on his own plea of guilt and sentenced to 20 years imprisonment.
4. Dissatisfied with both the conviction and sentence, the appellant vide a petition undated but filed in court on 17/7/2019 sought that the conviction and sentence be set aside.
5. The appeal was canvassed through written submissions by the appellant and an oral response by the DPP through Ms Kibungi.
6. In his submissions, the appellant states that he was subjected to serious torture by both the police and parents of the complainant before he was presented to court. He was forced to accept the charges or else he would have faced more torture,
7. He blames his predicament on a scheme by the parent of the complainant to avoid paying his salary arrears having worked for him for one and half years without pay. He dismisses the medical evidence relied upon as unreliable, the same having been procured from bribery.
8. For the DPP, it was submitted that the allegations of torture are an afterthought. They were never raised at the plea stage. The substance of the charge was read to the appellant in a language he understood and he pleaded guilty. He was convicted on his own plea of guilt.
9. He was given a chance to mitigate which he did and was sentenced to 20 years imprisonment. Due process was thus followed and his allegations now before court are baseless. The appellant is accused of introducing matters that would have been relevant had the matter gone to trial.
10. It is urged that the offence attracts a term of imprisonment for life on conviction under **S 8(2)** of the **Sexual Offences Act**. The trial court, however, alive to the decision in **Muruatetu case** sentenced him to 20 years. This sentence, it is urged, is lenient.
11. Counsel invoked the provisions of S 348 of the Criminal Procedure Code which provides;

“S 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.*”

12. I have considered the record of the lower court and the rival submissions before court.

13. The issues for determination are whether the plea was unequivocal and secondly whether the sentence passed was illegal and/or excessive.

14. The Law on plea taking is set out in **Section 207** of the **Criminal Procedure Code Cap 75, Laws of Kenya** which provides;

“S 207: *(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, 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 President’s 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 finds that the plea is false, the accused shall be required to plead to the charge.

15. The legal principles to be followed in plea taking were enunciated in the case of **Adan –vs- Republic [1973]EA 445** where the court held 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 raised 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.

16. A plea of guilt should be clear, unambiguous and unequivocal. In our instant case, the mainstay of the appeal is that the appellant was forced to admit the offence. There is no contention that he did not understand the charge. The record does not support the appellant’s contention. He never raised the issue of torture at the plea stage. The charge was explained to him in a language he understood. This is borne out of record.

17. As held in the case of **Olel –vs- Republic [1989] KLR 444;**

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

18. On the material before me, I am satisfied the plea of guilt on the part of the appellant was unequivocal.

19. Was the sentence illegal/and or excessive? Under **S. 8(2)** of the **Sexual Offences Act** the appellant was liable to serve a sentence of life imprisonment. The trial court alive to the freeing of shackles in sentencing by the famous **Muruatetu case** proceeded to exercise discretion in sentencing and meted out a sentence of 20 years imprisonment.

20. Am satisfied the sentence passed is appropriate and I have no basis to interfere with it.

21. With the result that the appeal herein lacks merit. The same is dismissed.

Dated, Signed and delivered at Kisii this 20th day of February, 2020.

A.K NDUNG’U

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person