REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 74 OF 2019

JOSEPH MBITHI KYALO ....APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the sentence of the Senior Resident Magistrate Hon. C.A. Mayamba dated 07/05/2018 in Kilungu SRMCR No. 21 of 2017.)

JUDGMENT

1. **Joseph Mbithi Kyalo** the Appellant was charged with defilement contrary to section 8(1)(2) of the Sexual Offences Act. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

2. The complainant was a child EMN aged 16 years. The charge was read to him on the first day he appeared for plea and he admitted the charge. When the facts were read to him he responded saying in Kiswahili language;

"Ni ukweli ilitendeka lakini wazazi wameongea."

3. The prosecutor then informed the court that the Appellant was a first offender. The court took his mitigation and proceeded to sentence him to 15 years' imprisonment.

4. He was aggrieved by the orders of the court and filed this appeal citing the following grounds:

> a) **That,** the learned trial Magistrate erred in law and fact by convicting the Appellant without according him an opportunity to defend himself.
>
> b) **That,** the learned trial Magistrate erred in law and fact by convicting the Appellant upon entering a plea of guilty which was not voluntary.
>
> c) **That,** the learned trial Magistrate erred in law and fact by convicting the Appellant without according him the right to a fair hearing when he was convicted for a charge that he did not understand.

5. Both parties filed written submissions which were briefly highlighted.

6. It is Mr. Mwongela's submission on behalf of the Appellant that his response to facts and which was repeated in the mitigation negated his admission of the facts. He relied on the case of **Stephen Githaiga Wachira –vs- R (2018) eKLR** which authority cited **Adan –vs- R (1973) E.A 445**.

7. He submits further that the original trial having been defective this court should order for a retrial. He cited the cases of **Ahmed Sumar –vs- R (1964) EALR 483, Kelvin Ochieng Tom –vs- R (2018) eKLR and Samuel Wahini Ngugi vs- R (2012) eKLR** in support of this submission.

8. It is his further submission that the Appellant is entitled to equal treatment with the complainant before the law. He relies on Article 27(1) of the constitution to support his argument. He also argues that the sentence passed against him is excessive.

9. The Respondent through learned counsel opposed the appeal. He submits that the charge was not defective and the extra words after the

admission of the facts meant there was another forum where the matter was being discussed. He urged thecourt to find the extra words after the admission not to have negated the plea.

10. Mr. Kihara was not comfortable with an order for a retrial since the parties appeared to have compromised the matter and tracing them would be a problem.

11. This is a first appeal and this court's duty is to re-analyse and re-evaluate the evidence and arrive at its own conclusion. See **Okeno –vs- R (1972) E.A.32, Kiilu & Another –vs- R (2005) 1 KLR 174.**

12. After due consideration of the evidence on record, the grounds of appeal, submissions and authorities, I do find just one issue falling for determination. The issue is whether the plea taken on 7th May, 2018 was unequivocal.

13. A critical look at the record reveals that:

i. Though a clerk by the name Gladys was in court it is not indicated in what language the charge was read. Did the Appellant understand the unknown language that was used to read the charge?

14. Plea taking is a critical stage of a trial and the trial court must ensure that the accused person clearly understands what is going on. See **Elijah Njihia Wakianda –vs- R Nakuru Criminal Appeal No. 73 of 2016(UR).**

15. The issue raised by Mr. Mwongela on the extra words stated after admission of the facts is very simple. There was documentation (EXB3) confirming that the complainant was aged less than eighteen (18) years. The issue of consent or parents discussing did not arise. However, with the failure to record the language in which all these were being said this court cannot be sure that the Appellant understood all that was going on.

16. Finally, and the most critical of them all is that the Appellant was never convicted of any offence. When he admitted the facts the trial court proceeded to take mitigation and sentence the Appellant.

17. In the case of **Adan –vs- R (1973) E.A 445 at page 446** the Court of Appeal sets out the procedure of plea taking. It states:

> ***"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 aske 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 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, of course, be recorded."*** *(emphasis is mine)*

18. The trial court could not proceed to pass sentence without a conviction. Infact the Appellant is serving an unlawful sentence.

19. I therefore find merit in the appeal which is allowed. The whole proceeding is set aside including the sentence.

20. I hereby order for a retrial.

21. The Appellant to be arraigned before the Principal Magistrates' Court at Kilungu for plea taking and further directions on 16th April 2020 before any court with jurisdiction other than Hon. C.A Mayamba.

22. In the event of a conviction the period spent in prison must be taken into account during sentencing. The matter must be disposed of expeditiously.

Orders accordingly.

Delivered, signed & dated this 3rd day of April 2020, in open court at Makueni.

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H. I. Ong'udi

Judge