**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 54 OF 2017.**

**GEOFREY NGALU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the conviction and sentence of the Resident Magistrate Hon. F. MUNYI delivered on 9th of May 2017 in Nakuru Cr. Case No. 86 of 2017.)***

**JUDGMENT**

1. The appellant was charged with one count and an alternative charge. The main count is the **offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on 22nd April 2017 at [particulars withheld] within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the anus of **RN** a child aged 6 years.

2. The alternative charge is the offence of committing an **indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on 22nd April 2017 at [particulars withheld] area within Nakuru County he intentionally and unlawfully committed an indecent act by touching the private parts namely buttocks of **RN** a child aged 6 years old.

3. On 5th of May 2017 when the charge was read to the appellant he pleaded guilty but after facts were read to him he said some facts stated were not correct. Plea taking was deferred to 8th May 2017 for the accused to understand the nature of charges against him.

4. On 8th May 2017 in camera the main charge was read over to the accused in Kiswahili to which he understood and responded '*Ni ukweli*' to the main count. Birth certificate, P3 form and the PRC form were produced as exhibit 1, 2 and 3 respectively. The appellant responded in Kiswahili '*ni ukweli lakini naomba msamaha'* translated in English to mean 'it is true but I ask for forgiveness'. The appellant was convicted on his own plea of guilty. He was given a chance to mitigate and he was sentenced to life imprisonment on 8th May 2017.

5. The appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, filed a Petition of Appeal dated 5th of June 2017 challenging the conviction and sentence on 4 grounds namely:

*i. The learned trial magistrate erred in law by failing to note that the plea was revocable in that it was made in total duress.*

*ii. The learned trial magistrate erred in law in failing to note that the appellant was not well informed of the gravity of the charges.*

*iii. The learned trial magistrate erred in law by failing to subject the appellant to a mental examination before convicting for such a serious crime.*

*iv. That the learned trial magistrate erred in law by failing to treat the appellant as a layman who was ignorant of the charges that were facing him.*

6. The state opposed the appeal on both conviction and sentence. The appellant filed written submissions while the prosecution submitted orally.

**APPELLANT'S CASE**

7. The appellant submitted that **Section 348 of the Criminal Procedure Code** which only allows appeals from convictions of plea of guilty only to the extent of illegality of the sentence. He further relied on the case of **Adan V Republic (1073) EA 445** where the court held that:

**"The charge and all the essential ingredients of the offence should be explained to the accused in a language he understands. The accused's own words should be recorded and if it is an admission a plea of guilty should be recorded. 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 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. 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."**

8. He submitted that when the substance and the elements of the charges were read and explained to him in a language he understood his reply was "*mengine ni ya uongo*" meaning some facts are false. The same facts were later read to him afresh and he replied in Kiswahili "*Ni ukweli*" meaning facts are correct and the Court entered a plea of guilty. The Court went further to note down the findings on the plea and it stated "I find that the plea is not clear since similar facts have been read in both cases and he has admitted to the facts that support the main account." The appellant submitted it was evident that the first plea had an element that was negated therefore a plea of not guilty was supposed to have been entered and the matter to proceed for full trial as he had already created doubt therefore the trial Court should not have concluded that the plea of guilt entered was unequivocal. It is his submission his right to a fair trial as enshrined in the constitution was violated, he was unrepresented and the honourable court did not educate him on his rights to representation by an advocate due to the seriousness of the charge facing him. He relied on the case of **Ndende v Republic (1991) KLR 567** where the Court of Appeal held that:

**"The Court is not bound to accept accused's admission of the truth of the charge and convict him as there may in the words of the statute appears sufficient to the contrary… where… at the time of taking plea there appears to be unusual circumstances such as injury to the accused or the accused is confused or there has been inordinate delay in bringing the accused to court from the date of the arrest etc then an explanation to the circumstances must form an integral part of the facts to be stated by the prosecution to court."**

9. The appellant further submitted the Court erred in law and facts by failing to find that the elements of the offence were not complete. The appellant was convicted and sentenced to life imprisonment which is a mandatory sentence. The nature of the offence was not brought forth before the Appellant. The charge was read without any warning as to what the appellant was to face after being found guilty. He further relied on the case of **Elijah Njihia Wakianda V Republic (2016) eKLR.**

**PROSECUTION'S CASE**

10. **Ms. Rita Rotich** for the state submitted that the appellant was sentenced on 9th May 2017 by **Hon. Munyi**. She stated that at first appearance in Court the facts were read to the Appellant in Kiswahili a language he understood and he said the facts are not true. He also said the facts were true in the alternative count; that the Court noted the discrepancy and deferred plea taking to give the accused time to understand the charge.

11. She submitted that charges were read after 3 days and the appellant pleaded guilty to the main charge and alternative charge and asked for forgiveness in Court. The prosecution produced the complainant's birth certificate to prove the age of the complainant. The P3 form and the PRC form were also produced to prove that the complainant was defiled. As pertaining the plea taking the Court was satisfied the appellant admitted the charge as **per Section 207 of the Criminal Procedure Code.**

**ANALYSIS AND DETERMINATION**

12. I have considered the grounds of appeal as well as the submissions made by both parties together with the cases cited. The main issue at hand is that the appellant contends that the plea of guilty entered by the trial magistrate was equivocal. I consider the following as issues for determination:-

i. **Whether plea entered was unequivocal**

ii. **Whether the sentence imposed was high**

i. **Whether the plea of guilt was unequivocal or not.**

The procedure and guideline for plea taking is well articulated in **Section 207 of the Criminal Procedure Code** and the same was affirmed by the Court in the case of **Adan Vs Republic [1973] EA 445** where it was 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."**

13. 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."**

14. From the record the Appellant stated to the Court he understands Kiswahili, further the Court went ahead to record that the substance of the charge and every element thereof were stated by the Court to the appellant, in Kiswahili language that he understood when asked whether he admits or denies the truth of the charge he replied "*ni ukweli"* to the main count. Prosecution went ahead to read the facts of the case and he responded in Kiswahili "*mengine ni ya uwongo*" meaning some facts are false and a plea of not guilty was entered.

15. The alternative charge of committing an indecent act with a child were read over to him and he replied "*ni kweli*". The facts were read afresh and he responded "*ni ukweli*" and a plea of guilt was entered. However, the Court found the plea was not clear since similar facts had been read over to him and he denied in the main count but admitted in the alternative count.

16. Plea taking was deferred to the on 8th of May 2017 for the accused to understand the nature of charge against him. On 8th May 2017 the charge was read over to the accused in Kiswahili language and he responded "*ni ukweli*" and to the facts he responded "*Ni ukweli lakini naomba msamaha*" which means in English "correct but I plead for forgiveness.

17. From the foregoing, the fact that plea of guilty was not entered the first day and the fact that the charge was again read to him after 3 days, he was given an opportunity to make up his mind concerning the charges he was facing, he was given time to reflect and decide on whether he wished to admit the charge or not. There is no doubt that he understood the language used as he used the same language Kiswahili to respond both on the first and second day of plea. There is clearly no doubt that he understood the charge he was facing.

**(ii) <u>Whether the sentence was excessive and harsh.</u>**

The trial magistrate sentenced the appellant to life imprisonment as the minimum sentence stipulated under the law. The issue of the constitutionality of mandatory sentences was canvassed at the Supreme Court in the **Francis Karioko Muruatetu & another - v -Republic [2017] eKLR** where it was held that mandatory sentences deprive Courts of their legitimate jurisdiction to exercise discretion to individualize an appropriate sentence to the relevant aspects of the character and record of each accused person.

18. The Appellant was charged with **Section 8 (1) as read with subsection (2) of the Sexual Offences Act:-**

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

19. The sentence meted upon the appellant by the trial court was the mandatory minimum sentence as provided in **Section 8 (2) of the Sexual Offences Act**. The discretion of the trial court to mete out a sentence to the appellant that is commensurate with the circumstances of the instant case was curtailed by the minimum mandatory sentence provided by the statute. The accused's mitigation was rendered superfluous by mandatory nature of death sentence.

20. I have considered mitigation on record; I also take note of the fact that the child who was sodomised was 6 years old and find it appropriate to reduce the appellants' sentence to 25 years' imprisonment.

21. **<u>FINAL ORDERS</u>**

1. Appeal on conviction is dismissed.

2. Sentence set aside and replaced with imprisonment of 25 years.

3. Sentence to run from the date of sentence by the trial court.

**Judgment dated, signed and delivered via zoom at Nakuru This 16th day of July, 2020**

**……**

**RACHEL NGETICH**

**JUDGE**

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

Jeniffer - Court Assistant

Rita for State

Appellant in person