REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 116 OF 2017

JUSTUS MUTINDA KELLE.....APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGEMENT

1. The appellant was charged and convicted with the offence of defilement contrary to section 8(1) of the Sexual Offences Act. He was sentenced to life imprisonment by the trial court in accordance with section 8(2) of the Sexual Offences Act.

2. A perusal of the trial court indicates that when the charge was read to him, and interpreted in Kiswahili, he replied "ni ukweli". A plea of guilty was entered by the trial court. On 3.10.2017, the charge was read out to the appellant again and translated into Kikamba language and he replied "***it is true".***

3. The court prosecutor read out the facts to him which were to the effect that on 17.3.2017, the victim was playing at home when the appellant grabbed her by her left hand and forced her into a bush and threatened her not to shout and undressed her. He undressed himself and laid her on the ground and defiled her then he gave her Kshs 5/-. The victim reported the matter to her uncle who pursued the appellant and took him to the chief and later to the AP's camp. In evidence was tendered the health card indicative that the victim was aged 9 years (Pexh3); the P3 form and treatment notes (Pexh 1 and 2). The appellant did not object to the production of the same and his reply was to the effect that the facts were correct.

4. The appellant was convicted on his plea of guilty and in mitigation he stated that he had an old parent born in 1933 depending on him. He was sentenced to life imprisonment after the court informed him that the Sexual Offences Act was rigid in the sentences imposed.

5. The appellant is dissatisfied with those proceedings and on 14.11.2017 appealed to this court where he challenged the conviction on the grounds that the plea was equivocal. He challenged the trial court for failing to comply with Article 50(2)(c) of the Constitution and section 207 and 169(1) of the Criminal Procedure Code and urged the court to quash the conviction, set aside the sentence and set him at liberty. Vide amended grounds filed without requisite leave, he challenged the trial court for entering a guilty plea whereas the mitigation qualified a conviction on an unequivocal plea; for failing to warn him that the case attracted a life sentence and for failing to subject him to a medical examination to ascertain whether he was mentally stable before entering a guilty plea.

6. Submitting in support of the appeal, the appellant in placing reliance on the case of **Adan v R (1973) EA 445** he submitted that the court did not adhere to the procedure for recording of the plea. The appellant also submitted that the trial court ought to have made an inquiry into his mental status and in failing to do so, then the trial court erred. The appellant also submitted that the trial court ought to have been lenient on him because he pleaded guilty.

7. In response, the learned counsel for the respondent argued that the plea that was recorded was in line with the procedure in the case of **Adan v R (1973) EA 446**. On the issue if sentence, counsel placed reliance on the case of **Jared Koita Injiri v R (2019) eKLR** and urged the court to exercise its discretion and call for a probation report before making a decision on an appropriate sentence.

8. The issues to be determined are on the propriety of the plea of guilty, whether the court may review the sentence and whether the failure to conduct the mental test on the deceased vitiated the trial court proceedings. According to section 348 of *The Criminal Procedure Code*, no appeal is allowed in the case of a person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the legality of the plea or to the extent or legality of the sentence.

9. The correct procedure of recording a plea of guilty and the steps to be followed by the court is now well established following the decision in ***Adan v. Republic, [1973] EA 446*** where Spry V.P. at page 446 stated it in the following terms:

"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 ask 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 record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged 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.''

10. It is incumbent upon a trial court when recording a plea to be meticulous in ensuring first that the charge is read and explained to the accused in the language he or she understands or is familiar with to enable him or her plead to the same properly and in unequivocal manner. In cases where an accused pleads guilty, to record the answer the accused gives as clearly as possible in the exact words used by the accused. Reading the facts of the case is meant to ensure that an accused's plea is taken in unequivocal manner and there should be no doubt as to whether the accused has understood the charges facing him in addition to the substance and every element of the charge.

11. 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 to the charge. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty and thereafter, the facts are narrated to the accused person and he or 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. The facts as read to the accused must disclose the offence. The accused is only to be convicted when facts narrated are in unison with the offence charged (see ***R v Peter Muiruri & Another (2014) eKLR***).

12. For a charge under sections 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006, it is necessary that the facts of the offence should specify; - the existence of a victim who is a child, unlawful penetration of the sexual organs of a victim and the identity of the perpetrator. In the instant case, the evidence that was tendered by the prosecution and the facts as read out clearly indicated the language that was used. The exhibits that were tendered spoke of the fact that the victim was aged 9 years at the time of the offence; and the P3 form was indicative of penetration and the identity of the perpetrator came out clearly in his plea of guilt. From these proceedings, the appellant cannot turn around and say that the plea was unequivocal.

13. The appellant has stated that because he made a mitigation statement, then a plea of not guilty ought to have been entered. In the case of **John Muendo Musau v R**, Nairobi Criminal Appeal 365 of 2011 the court observed that the trial court ought to enter a plea of not guilty when an accused makes statements in mitigation to counter the plea of guilty. The appellant in mitigation stated that he had a 1933 born mother who relied on him and hence it cannot be said that such a statement countered the plea of guilty. In fact, the appellant merely made his mitigation urging the court to consider the fact that he had an old mother who probably depended on him. In any case he had already confirmed that the facts were correct as stated. In the result, I find that the trial court did not err in entering a plea of guilty because for all intents and purposes, it can safely be concluded that the plea was unequivocal and that the same was sufficient to sustain the conviction. This ground raised by the appellant therefore collapses.

14. On the 2nd issue section 333 (2) of the Criminal Procedure Code states:

"(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

15. It is the considered opinion of this court having had due regard to section 333 (2) of the Criminal Procedure Code that the sentence imposed shall take into account the period that the appellant was in custody.

16. The appellant has sought that this court exercises leniency. It is noted that learned counsel for the respondent seems to have come to the aid of the appellant as he has cited the case of **Jared Koita Injiri v R (2019) eKLR;** and submitted that the life imprisonment be interfered with and that the court do call for a probation officer's report before an appropriate sentence is made in the matter. Section 8(2) of the Sexual Offences Act has prescribed a minimum mandatory term of imprisonment for life for such cases involving a victim aged below 11 years. In this case the victim was aged 9 years at the time of commission of the offence and which fell within the category of the 11 years age bracket.

17. Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

18. It is to be noted that the discretionary power exercisable by the court in sentencing with regard to capital offences had been well

pronounced by the Supreme Court. (See **Francis Karioko Muruatetu & another v Republic (2017) eKLR**). This court also notes that the Court of Appeal in the case of **Jared Koita Injiri v R (2019) eKLR** relied on the cited case to reduce a sentence of life imprisonment that was meted on an appellant. Whereas this is the position of the case, it is trite law that sentencing is a discretionary power and this court would not want to be seen to descend into the arena to propel a view that it is cool to defile a 9-year-old child and walk away while chest thumping with a reduced sentence after seeking resentencing. In any case should the circumstances warrant retention of the minimum sentence then this court will proceed to do so as each case must be considered on its own merits.

19. According to the Judiciary Sentencing Policy Guidelines, where the law provides mandatory minimum sentences, then the court is bound by those provisions and must not impose a sentence lower than what is prescribed. The guidelines indicate that the only recourse is reform of the law. See **Kennedy Munga v. Republic [2011] eKLR** in which an order for probation in a defilement case was held to be illegal and that the sentence was revised to fifteen years' imprisonment.

20. The preamble to the Sexual Offences Act provides that it is "**An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes"**

21. The authors of the Act had in mind the protection of vulnerable members of society and the welfare of children hence accused persons convicted of such offences shall not expect leniency from the Court of Appeal or any other Court for that matter. Children are a precious gift from God and represent the future generation. They must be jealously protected, properly nurtured and given all the required support and care by each and every adult person instead of taking advantage of them.

22. In addition, as recent as yesterday the president of this county stated in the 9th State Address on the Corona Virus and I quote

> "***Turning to the social front as my last point, I am concerned by increasing tensions within our homes. Cases of Gender-Based Violence have increased, mental health issues have worsened, and instances of teenage pregnancy have escalated.***
>
> ***32. I appeal to social institutions, including the religious institutions, to exercise civic responsibility to bring these unfortunate trends to an end***
>
> ***33. We must always remember that the family is a projection of the State. If the family is under attack, the State is under attack. If the family is weak, the country is weak."***

23. This is therefore a proper case to exercise that civic duty that the president so passionately talked about; to protect the state against attack that is a result an attack on the family.

24. In the Judiciary Sentencing Policy Guidelines "The guiding principles in sentencing are summed up in four words: retribution, deterrence, rehabilitation, restorative justice, denunciation and community. The authors of the Sexual Offences Act had in mind retribution in punishment of this crime to express the pain and disgust of the society when an accused is convicted with such a crime. They were aware of the lasting trauma the victims have suffered and will continue to suffer. Further the victim will have to live with the stigma of being a victim of sexual abuse for the rest of her life. Paedophiles are a curse unto our society and our children need to be protected from their acts. The specific provisions of the Sexual Offences Act relating to pedophiles need to be applied by the courts in the way it was intended so as not to normalize such deviant behaviour. I find that the sentence imposed by the trial court was neither wrong in principle, nor manifestly excessive nor illegal nor is there a miscarriage of justice and I do not propose to interfere with the said sentence imposed and this ground of appeal is accordingly dismissed.

25. The final issue that the appellant mentioned was failure to conduct a mental assessment on him. Section 162 (1) of the Criminal Procedure Code provides:

> "***When in the course of a trial or committal proceedings, the Court has reason to believe that the accused is of unsound mind and consequently, incapable of making his defence it shall inquire into the fact of unsoundness".***

26. From the record, the appellant never exhibited any behavior that would have made the trial magistrate to see the need for a mental examination. In the case of **Julius Wariomba Githua v Republic [2008] eKLR** it was stated by the Court of Appeal that ;

> "***In the present appeal, we were not shown any medical report on the mental status of the appellant. It was stated from the bar that the appellant's medical report had been filed but this has never been shown to us."***

27. In the same case, the Court of Appeal relied on the case of **Muraya v Republic [2001] KLR 50** and held, inter alia, that,

> "***if an inquiry is conducted pursuant to section 162 of the Criminal Procedure Code and upon inquiry there is evidence of unsoundness of mind, further proceedings must be adjourned and further consequences follow to ensure the accused is medically treated and becomes mentally fit to understand, follow and participate in the trial.***

28. In view of the above authorities, an in the absence of reason to believe that the appellant was mentally challenged, the mentioned mental assessment was not required, hence failure to conduct the same did not vitiate the trial. In any case the appellant fully participated in the proceedings without any hitch and hence the present claim is an afterthought and must be rejected. This ground raised by the appellant hereby collapses.

29. In the result and save only to the extent that the life sentence imposed shall commence from the date of arrest namely 17.9.2017, the

appellant’s appeal lacks merit and the same is dismissed.

It is so ordered.

Dated and delivered at Machakos this 21st day of July, 2020.

D. K. Kemei

Judge