



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 47 OF 2020

JOSEPH KIPLAGAT ROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

JOSEPH KIPLAGAT ROTICH was charged with the offence of attempted defilement, contrary to *Section 9(1)(2)* of the Sexual Offences Act No. 3 of 2006.

The particulars of this offence are that on the 12th day of May 2020 at [Particulars Withheld] village Epkee location in Keiyo south Sub-county within Elgeyo Marakwet County, the appellant herein attempted to cause his penis to penetrate the vagina of *JJK*, child aged 8 years.

The plea was taken on 14th May, 2020 at Iten Law Courts before *Hon. Ateya*, a Senior Resident Magistrate. It was stated to the appellant who was unrepresented in Keiyo language. When the charge and its particulars were read to him he stated that, "*it is true*" and the court entered a plea of guilty. The facts were then read as follows:-

"On 12th May 2020 at 5.00 p.m the complainant was with her friend M fetching firewood in the compound of the accused. He called them to his house. The complainant and her friend carried firewood to the house of accused. He gave them a lollipop sweet each. They ate the sweet. The accused gave them raw bananas to roast. The complainant did and they ate. M left leaving complainant in the house with the accused. Accused closed the door then carried complainant to his bed. He told her to remove her inner pant but she refused. He undid his zip then lay on top of the complainant. Immediately her sister PC arrived and peeped through an opening in accused's door. She saw accused lying on top of complainant and shouted, "tabia mbaya". Complainant screamed and accused got up and opened the door. Complainant left and they went and informed her mother what had happened. She was rushed to Biretwo Health centre and the matter reported at Chepsigot police station.

Accused was arrested and taken to Iten Police station.

P3 forms were issued to both complainant and accused.

Age of complainant was ascertained by birth certificate showing 17/7/2013 as date of birth. Birth certificate PExhibit -1. Treatment notes P-Exhibit -2.

P3 form of complainant indicates minor laceration on vaginal wall – P-Exhibit -3. Accused was then charged."

To the foregoing facts the appellant stated they were true and he was found guilty on own plea.

The prosecutor indicated that he was a first offender.

In mitigation, the appellant prayed for pardon. He said they will see how to sort out the issue. He indicated that he was drunk and did not know what he was doing. He was 63 years old and couldn't see from eyes. He had injured his hands.

He was sentenced on 18th May 2020 when the court indicated that:-

“I have considered the mitigation by the accused and the circumstances of the case. The accused pleaded guilty to the offence and was well aware of his actions.”

The offence provides for a minimum sentence of 10 years. Given the mitigation raised, accused is hereby sentenced to serve 10 years in jail.

The appellant through his Advocate, dissatisfied with the said conviction and sentence, appealed to this court on eleven grounds of which ten were abandoned during hearing and remained with one that the learned magistrate erred in law and fact in failing to afford the appellant a fair hearing and thus violated the appellant's right as enshrined in *Article 50(2) (b)* of the *Constitution of Kenya 2010*.

The appellant submitted that given the fact that he was unrepresented then, and the seriousness of the offence and the sentence it attracts, the trial magistrate should have administered caution to him as to the consequences of his plea of guilty.

Failure to do so contravenes his right to a fair trial as enshrined in *Article 50 (2) (b)* of the *Constitution*. To buttress this point he relied on two high court decisions; ***Eldoret Criminal Appeal No. 95 of 2017 of Colins Kiplagat Koech -vs- Republic***, in which the court held:-

“.....and therefore it is a serious error on the part of the lower court for not explaining all the elements of a charge of defilement including information about the sentence entailed thereby.....in the premises, the failure by the lower court to adhere to the provisions of Article 50 (2) (b) of the Constitution by explaining all elements of the charge of defilement including information about the sentence entailed thereby is inexcusable as it vitiates the entire plea-taking process.”

The other case is ***Nakuru Criminal Revision No. 291 of 2020, of Ernest Kiarie -vs- Republic***, where the court stated:-

“Indeed any offence which attracts a significant custodial sentence must be considered “serious” for purpose of plea-taking where an unrepresented person pleads guilty to such a felony charge, the plea court should warn him of the possibility of being sentenced to prison.....”

On her part, the state prosecutor opposed the appeal and submitted that the plea of guilty by the appellant was unequivocal and an appeal does not lie on a plea of guilty unless the said plea is equivocal.

Having considered the issues raised in this appeal, I can say that the state prosecutor did not address in her submissions the ground relied on by the appellant, that unrepresented accused person charged with a serious offence or offences, who wishes to plead guilty to such an offence or offences ought be cautioned by the trial court of the possible consequences of such plea of which includes the sentence it may attract. This is as per the right to a fair hearing as provided for in *Article 50 (2) (b)* of the *Constitution of Kenya 2010*, which reads, *(b)* to be informed of the charge, with sufficient details to answer it,”

From the proceedings of the lower court it is clear that the appellant was not cautioned of the sentence the offence he was pleading guilty to could attract. It is of no doubt that the offence of attempted defilement is a serious offence. He was as well unrepresented. The omission is a serious one and makes the plea of guilty equivocal.

The appeal therefore succeeds. The conviction is quashed and the sentence set aside. The matter is not old as the plea was taken on 14/5/2020, about 4 months ago. I find this a suitable case for retrial. The appellant should therefore be availed before a different magistrate at Iten Law court for plea taking.

Mention of the matter at Iten Law Court on 16/9/2020.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 11th day of September, 2020.

In the presence of:-

Mr. Korir for the appellant

Ms Limo for state

Ms Gladys - Court assistant