REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.49 OF 2017

(From SRM's Kimilili Cr.No.76 of 2016 by: Hon. D.O. Onyango (SRM

HAMFREY KAKAI MULATI..…...……..…..APPELLANT

V E R S U S

REPUBLIC……....RESPONDENT

JUDGMENT

Hamfrey Kakai Mulati, the appellant, pleaded guilty to the offence of defilement Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act. The particulars of the charge were that on 7/5/2016 at [particulars withheld] in Bungoma North Sub-County, intentionally and unlawfully caused his penis to penetrate the vagina of MNK a girl aged 17 years. Upon conviction, he was sentenced to serve 15 years imprisonment.

Being dissatisfied with both conviction and sentence, he preferred this appeal based on the grounds in the petition of appeal dated 28/4/2017, filed by Otsiula & Associates. The grounds are as follows:

(1) That, the magistrate erred by convicting the appellant on the basis of insufficient evidence;

(2) That the magistrate erred by allowing the prosecution to amend the charge without affording the accused person an opportunity to respond to the application for amendment and hence occasioned a miscarriage of justice;

(3) That the magistrate failed to take cognizance of the fact that the amended charge was equivocal;

(4) That the magistrate erred by convicting the appellant based on insufficient medical evidence and the court failed to produce age assessment report of the complainant;

(5) That the magistrate erred by failing to take cognizance of the fact that the complainant had presented himself to the appellant as an adult;

(6) That the magistrate failed to consider that the appellant's mitigation rendered the plea equivocal;

(7) That the magistrate erred by passing a harsh and unconstitutional sentence.

Mr. Otsiula, counsel for the appellant reiterated the above grounds. He urged that when the appellant stated that he was ready to talk to the complainant's parents and care for the child, that rendered the plea equivocal; that the application to amend the charge was done during the proceedings and the appellant should have been allowed to respond to the said application; that the complainant conducted herself like a mature person and that the sexual act was consensual being close to the age of majority and the sentence was therefore unlawful.

Ms. Njeru opposed the appeal urging that the appellant's mitigation was a further admission of the offence charged; that the appellant knew the complainant to be a student while he was 30 years old and the fact that the complainant was about 16 years old did not give the appellant a right to commit the offence; that the Birth Certificate was proof of the age and the age determined what the sentence would be.

On the issue of amendment of the charge, Ms. Njeru submitted that the application was made after only PW1 had testified; that it was a minor amendment that did not go to the root of the charge. Counsel urged this court to uphold the conviction and sentence.

I have considered the grounds of appeal, the rival submissions by both counsel. Section 348 of the Criminal Procedure Code bars any appeal against conviction where an accused has pleaded guilty. An accused may only appeal on the severity and legality of the sentence.

In ***Olel v Republic (1989) KLR 444*** the court held that where an accused is convicted on his own plea of guilty, he can only appeal against the legality and extent of sentence. However, in ***Ndeda v Republic (1991) KLR 567*** the Court of Appeal held that the bar against an appeal on plea of guilty is not absolute as Section 348 Criminal Procedure Code seems to suggest.

In ***Wandete David Munyoki v Republic (2015) KLR***, the Court of Appeal held as follows:

> ***"It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty except to the extent and legality of the sentence, is not an absolute bar to changing such a conviction on any other ground. Indeed in Ndeda v Republic (1991) KLR 567, the court held that the court is not to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstances such as injury to the accused person or the accused persons may be confused or there may have been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed….."***

From the above authorities, it is clear that a plea of guilty is not an absolute bar to an appeal against conviction on any other ground which in the court's discretion, may be found to be justifiable. For example, where the plea is equivocal, an appeal will lie.

The case of ***Adan v Republic (1973) EA 445*** set the guidelines on the manner in which a plea of guilty may be recorded. The court 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 which 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 raises any question of his guilt his reply must be recorded and change of plea entered; and***
>
> ***(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.***

See also ***Kariuki v Republic 1984 KLR 509***. The plea must be free and voluntary.

In this case the applicant's counsel urged that the appellant's mitigation rendered the plea equivocal. In his mitigation, the appellant stated that "***I am now ready to talk to the parents of the complainant. I am ready to take care of the child.***" The facts had revealed that after the complainant was allegedly defiled, the appellant disappeared from the area and never offered any assistance for the child. In my considered view, the appellant's mitigation goes to support his admission of the facts that he does have a child with the complainant and is now ready to take care. Those words do not render the plea to be equivocal. I find that the plea was unequivocal.

The prosecution produced the complainant's birth certificate which indicates that the complainant's date of birth is 11/3/1997. As of 7/5/2014, the complainant had just turned 17 years. Nowhere in his mitigation did the appellant indicate that the complainant presented herself as an adult. From the facts which the appellant admitted, the complainant was coming from school when the appellant accosted her; that they were neighbours. Since the complainant was a student, it was the duty of the appellant to ascertain whether or not she was of age before engaging in sexual intercourse with her. It does not matter that the complainant consented to the sexual advances. She had no capacity to consent at the time.

The prosecution applied to amend the charge after the complainant had testified but had not yet been cross examined. From the record, the appellant was not invited to respond to the application to amend the charge sheet but the court went ahead to accept the amendment and read the charge to the appellant afresh. I agree with the appellant that the proper procedure is that the appellant should have been invited to state whether or not he objected to the amendment. That notwithstanding, the question is whether the failure to invite the appellant to respond to the application for amendment was prejudicial to him. I find that it was not. First, only PW1 had testified but not yet cross examined. Further, the amendment was minor, it was only as relates to the date. Under Section 214 of the Criminal Procedure Code, the court has wide discretion to amend a charge which it can do on its own motion provided that the amended charge read to the accused. Whereas the charge read "***on diverse dates, between 8/5/2010 and 18/5/2014, the date was now specific that is '7/5/2014'***". The amendment did not go the root of the charge. Thirdly and most importantly, the amended charge was read to the appellant to which he pleaded guilty.

As to whether the sentence was harsh and unconstitutional, that ground cannot be sustained. The appellant was charged under Section 8(1) as read with Section 8(4) of the Sexual Offences Act. Under Section 8(4) the minimum sentence that can be meted is 15 years imprisonment. The appellant was handed the minimum sentence and this court has no discretion to vary it.

In the end, I find the appeal to be without merit. It is hereby dismissed.

Signed and **Dated** at **Nyahururu** this ***25th*** day of ***April***, **2019.**

R.P.V. Wendoh

JUDGE

Delivered by *S. Riechi (J)* at BUNGOMA this *20th* day of May, *2019*.

PRESENT:

Ms. Nyakibia - Prosecution Counsel

Wilkister - Court Assistant

Appellant - present