REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.36 OF 2017

(From C.M's Court at Bungoma SOA 24 of 2017 by: Hon. S.O. Mogute (PM)

MESHACK JUMA WAFULA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

Meshack Juma Wafula, the appellant, was convicted by Hon. Mogute P.M. for the offence of defilement Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No.3 2006.

The particulars of the charge are that on 21/5/2014, at [particulars withheld] Village Mukuyuni Location, Bungoma County, intentionally and unlawfully caused his penis to penetrate into the vagina of F.N.M. a girl aged 16 years old.

In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offence Act in that on 21/5/2014, intentionally and unlawfully caused his penis to touch the vagina of F.M.M., a girl aged 16 years.

Upon conviction on his own plea, the appellant was sentenced to serve 15 years imprisonment.

The appellant filed an appeal on 24/3/2017 on both conviction and sentence citing the following grounds:

(1) That the court erred by not warning the appellant of the consequences of the plea;

(2) The plea was equivocal having been beaten and threatened by the police;

(3) That the complainant had told him that she was an adult aged 22 years;

(4) That the charge is defective;

(5) That the appellant was not allowed representation by counsel as required by law.

The appellant therefore prays that the conviction be quashed and sentence set aside and he should be retried.

In addition to the grounds of appeal, the appellant filed submissions which he adopted at the hearing. He added that he should have been given 14 days before the charge could be read to him.

The appeal was opposed by Ms. Njeru learned counsel for the State counsel who submitted that after the appellant pleaded guilty, in his mitigation he admitted to having had a child with the complainant and pleaded that if he was jailed, the child would suffer and that had it not been for the appellant's refusal to take care of the child, he would not have been in prison; that the appellant befriended the complainant, took her to his home, made her pregnant and when her parents found out her whereabouts, they looked for her but failed to get her because the appellant had gone to hide the complainant at his grandmother's home. Thereafter the appellant fled to Naivasha where he started to work in flower farms; a child case was filed for maintenance and the court was of the view that it was a defilement case and the appellant should be charged. Counsel urged this court not to interfere with both conviction and sentence.

Section 348 Criminal Procedure Code bars any appeal against conviction where one has pleaded guilty to the charge.

The section provides:

> "***No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except to the extent or legality of the sentence.***"

For the court to sustain a plea of guilty, the plea must accord with the provisions of Section 207(1) and (2) of the Criminal Procedure Code. The said provision was expounded upon in the renowned case of ***Adan v Republic (1973) E.A. 445*** where the court stated as follows:

> ***"(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."***

The Court of Appeal further expounded on grounds in which a plea of guilty can be disturbed in the case of ***Alexander Lukoye Malika v Republic 2015 eKLR*** when the court said:

> "***A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts.***
>
> ***An appellate court may also interfere where the charge laid against the accused person to which he has pleaded guilty disclosed no offence known to law.***
>
> ***Also where upon admitted facts the appellant could not in law have been convicted of the offence charged."***

When the appellant was arraigned before the court, the court enquired what language he understood and he replied that it was Kiswahili. The charge was read to him and he replied "***ni ukweli***". The facts were read to him and it is recorded that "***maelezo ni ya ukweli***" meaning – the facts are true. After conviction he was asked to give his mitigation and he told the court as follows:

> ***"I have admitted having committed the offence herein. We have got a child together with the complainant. If I am jailed, the child will suffer."***

Clearly, the appellant understood the fats, actively took part in the proceedings and admitted having a child with the complainant. To get the child, there must have been penetration and the complainant being a child, she was defiled. The appellant cannot therefore claim that the plea was equivocal.

The facts were detailed; that it was only after the complainant went back to school that she was found to be pregnant, was sent away from school that the appellant took her into hiding till she delivered and when he learnt that he was being sought by the complainant's parents, he went into hiding till the court ordered for his arrest. The police took action and arrested the appellant. The appellant admitted all those facts. PW1 was a form III student then. Had the complainant told the appellant that she was 22 years old, I believe he would have told the court during the plea which he did not. The allegations that the complainant had told the appellant that she was 22 years in my view is an afterthought and must be something he has just learnt that he could raise at this stage.

The appellant also alleges to have been threatened and beaten by police. At the time of plea or even during mitigation, the appellant never stated that his plea was influenced by police nor did he state to the trial court that he had been intimidated in any way. There is no evidence on record to show that the appellant was indeed threatened or beaten by the police that made him plead to the charge. Further, the appellant did not make any confessions to the police.

In the case of ***Olel v Republic (1989) KLR 444***, faced with such allegations, the Court of Appeal said:

> ***"Mere detention long or short of itself cannot be a factor to determine whether or not a plea is unequivocal. It is what may be done to the appellant while in detention that may affect the character of the plea. Since there is no material except the record of the proceedings on which we can judiciously determine the question, we must go by the record and accept as true the position stated therein. In my view, to do otherwise would be tantamount to substitute the known and admitted facts of the case with unjustifiable speculation."***

The record of the court does not disclose any evidence of threats or violence being meted on the appellant to coerce him into pleading guilty to the charge. In my view, these allegations are afterthoughts meant to persuade this court to allow the appeal. The court finds no evidence of threats or coercion by the police or anybody else.

The appellant also complained that he was not accorded legal representation at the State expense contrary to Article 50(2)(h) of the Constitution.

The Article provides as follows:

> ***"Article 50(2) every accused person has the right:***
>
> ***(h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result and be informed of this right promptly."***

To comply with the above provision, it must be read together with the Legal Aid Act, Section 43 therefore, it lays down the duties of the court where an accused is unrepresented. It provides:

> ***"A court before which an unrepresented accused person is presented shall:***
>
> ***(a) Promptly inform the accused of his or her right to legal representation;***
>
> ***(b) If substantial injustice is likely to result, promptly, inform the accused of the right to have an advocate assigned to him or her; and***
>
> ***(c) Inform the service to provide legal aid to the accused person."***

I believe, the above provision was included in the Constitution because of the complexity of our adversarial criminal justice system in which an accused may not be able to ably defend himself and this was expressed well in the case of ***Pett v Greyhound Racing Association (1968) 2 All E.R. 545 (P.549)*** where Lord Denning said:

> ***"It is not every man who has the ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness on the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross examine witnesses. We see it every day a magistrate says to a man; you can ask any questions you like; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for that task."***

The question of legal representation was discussed by the court of Appeal in the case of ***Macharia v Republic*** HCCA.12/2012 (eKLR 2014) where the court said "***Article 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice. This varies with the repealed law by ensuring that any accused person regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence…. We are of the considered view that in addition to situations where 'substantial injustice would otherwise result; persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense."***

The court in ***Karisa Chengo and 2 others v Republic Cr.No.44, 45 & 76 of 2016***, the court also observed that the right to legal representation is essential to the realization of a fair trial more so in capital offences.

From a reading of the above authorities, it is clear that the right to legal representation is not absolute and there are situations it can be limited. It must be established that the accused will suffer substantial injustice if one is not accorded legal representation and that is why the courts have said that the gravity of the offence, the nature of the reality or severity of the sentence must be taken into account; whether accused is a minor or illiterate and not able to understand the court proceedings is also a factor to be considered.

In this case, the appellant was charged with the offence of defilement under Section 8(1) as read with Section 8(4) of Sexual Offences Act.

The maximum sentence upon conviction is 15 years imprisonment did not carry a death or life sentence and in my view, no substantial injustice was suffered by the appellant. The appellant pleaded guilty and there is no evidence that he had any difficulty in understanding the proceedings or that he was prejudiced. The right to legal representation was not violated and that ground must fail.

In the end, I come to the conclusion that the plea was unequivocal and the appellant was properly convicted as charged. The sentence is lawful as the appellant was handed the minimum sentence under Section 8(4) of the Sexual Offences Act. The appeal lacks merit and is hereby dismissed.

Signed and Dated at Nyahururu this 7th day of May, 2019.

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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