REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 55 OF 2018

IAN KIBET NICHOLAS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. IAN KIBET NICHOLAS was convicted on his own plea of guilty for the offence of defilement Contrary to Section 8(1) as read with 8 (3) of the Sexual Offences Act and sentenced to serve 20 years imprisonment.

The particulars of the charge were that on 29th October 2016 at **[Particulars Withheld]** village in **WARENG** district within **UASIN GISHU** County he caused his penis to penetrate the anus of **KKT** a boy aged 14 years.

2. Initially the appellant denied the offence, but after **KKT** and the Doctor had testified, he changed plea and admitted the charge.

3. The facts as narrated to the trial court were that, on 24.10.2016 (I think this is a typo error as the hand written record reads 29th October 2016), the complainant **KKT** was herding cattle on their land, when the appellant called him over during the day, and defiled him (sodomising him).

Once the appellant was through **KKT** ran away while crying and bleeding, as he had been injured. A report was made to the police and the minor was taken to hospital.

The P3 form which was duly filled showed that upon examination of **KKT** the Doctor noted anal bruising and laceration of the anal area due to penetration. The bruising appeared fresh. The conclusion was that he had been sexually molested as evidenced by the anal penetration, bruising and laceration of the anal canal. The clinic Health Record Card showed his date of birth as 9.9.2001, making him 14 years and 11 months as at the time of the offence.

4. The facts were read out to the appellant on two different occasions because the prosecution feared that he may not have been mentally fit, and he was even cautioned about the severity of the sentence. He however maintained that he was not mentally challenged, and confirmed to the trial court that the facts were correct. He was thus convicted on his own plea.

5. He now contests both conviction and sentence saying the plea was not unequivocal as he did not understand the nature of the charge.

In his grounds of appeal he urged the court to exercise mercy, saying he was young and was at school, so the custodian sentence interfered with his education, rendering him to face a dark future. He also expressed remorse.

6. He canvassed his appeal through written submissions which he now states that the plea was not unequivocal as he did not understand the language used by the trial court. That in any event the court was not bound to accept his admission, especially because there had been doubts expressed by the court that he seemed to be in a state of mental confusion.

7. In opposing the appeal, MS Mumo pointed out that, the charge and facts were read to the appellant on various separate occasions, and when the prosecution suggested that he should be subjected to a mental examination, the appellant was totally opened to that.

The charges were read out to him on 3 different occasions and M/S Mumo points to that the same was read out to him in Kiswahili and he replied in Kiswahili.

Further, that before the charge and facts were read out, the trial magistrate cautioned the appellant on the nature of the charge, but he insisted on pleading guilty.

She urged this court not to interfere with the sentence, saying it was legal.

8. In reply the appellant stated;

> ***"I admitted the charge out of frustration, I was suffering in remand and was told to admit the charge so as to be released, so I obliged."***

From the record, when plea was first taken on 2.11.2016, the charge and particulars were read to him in Kiswahili and he replied;

> ***"It is not true."***

He even told the court;

> ***"My relatives are not in court."***

On that day the facts were not given as the prosecution applied for another date to narrate the facts.

9. On 1.2.2017, the facts were narrated (although the language used was not recorded) and the appellant replied

> ***"Maelezo (Sic) ni ya kweli."***

He was then cautioned that the offence was a serious one and the penalty it attracted and he requested that the charges be read out to him. The record reads;

> *"The substance of the charge sheet and every element thereof has been stated to the accused person in the language he understands, who upon being asked whether the admits or denies the truth of the charges he answers;*
>
> ***"Ukweli."***

The prosecution then requested that before the facts were read, the appellant be taken for a mental assessment on suspicion that he had a mental problem.

The appellant stated;

> ***"It is okay."***

On 8.2.2017 when the matter was listed for mention, the court was informed that the mental assessment report was not ready, and the matter adjourned to 27.02.2017. However the report was not ready owing to the then on-going doctor's strike. The appellant was aggrieved by that delay and told the court

> ***"I should just be sentenced even if it is being imprisonment (Sic), I don't care."***

However the court adjourned the matter and the next date on 15.03.2017, with no let up on the doctor's strike the appellant answered

> ***"I am not mentally sick. I am very normal. I still plead guilty. I can't help on coming here. I don't know here the prosecution got the idea that I am a mad person. I am not mad. I wish to plead guilty so that I start serving my sentence."***

10. The prosecution confessed that he had no reason for saying that the appellant was mentally challenged, so the court recorded that charge read over and every element explained to "accused in a language he understands.", and the appellant replied "Ukweli."

Once more he was cautioned by court admitting that the offence would earn him a prison term of not less than 20 years. When the facts were read he stated;

> ***"Maelezo ni ya kweli. I am normal, I committed the offence."***

11. When called upon to make his plea in mitigation, the appellant said;

> ***"I have nothing to say, I commuted the offence."***

It is instructive that the appellant carefully omits to mention what language the court was using, although at the initial stage when the plea was taken, the court recorded that the charge was read in Kiswahili. His responses were recorded partially in Kiswahili, and at the hearing of the appeal, he elected to use Kiswahili as his medium of communication.

It may therefore safely be concluded that the appellant understood Kiswahili.

12. Unfortunately on the subsequent dates when the appellant opted to change his plea, the court did not record what language was being used, simply indicating that the charge had been read to the appellant in a language which he understood.

There was no indication what language the appellant had elected to use, although for the recorded responses he appeared to use Kiswahili.

13. The critical question is, were the facts narrated in Kiswahili, or were they narrated in English then translated to whatever language. What was the respondent saying "Ukweli" to – was it some narration in English. Of course it is most likely that the language used was Kiswahili, so as to elect a Kiswahili response, yet it would be unfair to make such presumption. A trial court must clearly indicate the language used and what language an accused person has elected, and even the language a witness uses. This is what Section 198 (1) CPC explains when it provides that;

> **Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.**

It is on account of this that I am compelled to conclude that the conviction was unsafe and is quashed. The sentence be and is hereby set aside. This was a mistrial on account of failure by trial magistrate to record the language used – it is not enough to say "in a language he understands." Without specifically the language.

Even the facts as narrated and even the earlier evidence if the two witnesses who had testified, and that the appellant has not even served ¼ of the sentence.

I hold the view that justice will be done by having as re-trial.

I therefore direct that the appellant be presented before the Chief Magistrate's court Eldoret on 12th June 2019 for plea taking and further trial directions.

DATED, SIGNED and DELIVERED at ELDORET this 6th day of June 2019.

H. A. OMONDI

JUDGE