REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: E. K. O. OGOLA, J.

CRIMINAL APPEAL NO. 62 OF 2017

GODFREY LIDAYWA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by M. Nabibya, SRM, in Hamisi SRM Criminal Case No. 549 of 2017 dated 25/9/2017)

JUDGMENT

1. The Appellant was convicted upon his own plea of guilty to the charge of defilement contrary to S. 8 (1) as read together with S. 8 (2) of the Sexual Offences Act No. 3 of 2006. The alternative charge was committing an indecent act with a child contrary to S. 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 16th day of September, 2017 in Vihiga County, the accused intentionally and unlawfully caused his penis to penetrate the anus of a minor boy child aged 8 years. The trial court sentenced the Appellant to life in prison.

2. The Appellant being dissatisfied with the conviction and sentence, has preferred this appeal on grounds that:-

1. THAT I pleaded guilty.

2. THAT the trial court erroneously convicted me without prior warning of the dire consequences of pleading guilty to charge.

3. THAT I pleaded guilty to the charge after being threatened by the police with more torture having incurred several injuries from the wrath of the members of the public.

4. THAT the charges were read to me in a language that I did not understand hence could not respond appropriately.

5. THAT the trial court erred in its findings by failing to consider that the facts of this case were not read to me.

6. THAT the trial court erred in law by convicting me without observing that I was denied the opportunity to mitigate.

7. THAT I pray for court proceedings and wish to attend the hearing of this appeal.

3. The proceedings are very brief in this matter. Because the Appellant had pleaded guilty to the offence, there was no need to avail witnesses to prove the prosecution's case. However, it is now one of the grounds of this appeal that the Appellant did not plead guilty and that he was forced to plead guilty or that the consequences of the guilty plea were not explained to him.

4. This court can only be guided by the brief proceedings herein. On 21st September, 2017 the Appellant took plea in court. The substance of the charges were read to him in Kiswahili language which he understood. Record shows that every element of the charge was read and explained to the Appellant in Kiswahili language. The plea was taken twice on two different occasions. On 21st September, 2017 after the charge had been read to the Appellant he responded as follows:-

To Main Count –

Sikumguza mahali popote.

Alternative Count – ***Ni ukweli.***

The court then adjourned the plea to 25.9.17. On that day the charges were read afresh to the Appellant in Kiswahili language which the Appellant confirmed he understands. He responded as follows:-

Accused – ***Sikumuingia, ziliguzana tu.***

5. The trial court then proceeded to record the facts of the case as explained by Mr. Kabutha for State as follows:-

> ***"The facts are that on 16/9/2017 at around 5.00 p.m. complainant was a young boy of 7 years old (name withheld by court) was heading home from Kiritu shopping centre where he had been sent by his mother to collect milk. On the way home, accused called him; he was following him from behind. They were known to each other.***
>
> ***Accused gave him a ball (green tenis ball), he then lured him to go behind a church building. Accused also had a panga and an empty sack. He then forced him to lie down on his stomach, he removed his short, lowered his blue jeans to below his waist, he removed his black inner wear, removed his penis and proceeded to bring it in contact with complainant's anus.***
>
> ***A lady called Leah who had gone to the church for prayers heard the disturbances and went to check, she found accused on top of the boy committing the indecent act. She raised an alarm and informed the parents of the child.***
>
> ***The matter was reported to Mudete police station, the child was treated at Itendu Hospital, a P3 form filled after being issued, accused subsequently charged.***
>
> ***The panga in possession of accused is before court and the green tennis ball which I produce as P-Exhibit 1 and 2 respectively. The treatment notes – P-Exhibit 3. P3 form – Ref. No. 10395 – P.Exhibit 4 confirms that complainant was injured on his anus.***
>
> ***The child's baptismal card showing his date of birth as 23/12/09 – P.Exhibit 5 (copy produced, original returned to the guardian)."***

In response to the said facts, the appellant replied as follows:-

> ***Accused – Sehemu yangu ya siri iliguza sehemu yake ya kuenda choo, lakini sikuingia ndani.***
>
> ***Court – Plea of guilty entered in the alternative count and accused convicted on his own plea."***

6. The trial court then entered the plea of guilty and proceed to convict the Appellant on his own plea of guilty. On mitigation the Appellant cried out to court to help him, stating that he was only 25 years old. The court considered the mitigation and decided that the offence was serious and prevalent in the area and passed what is considered a deterrent sentence of life in prison.

7. This being the first appeal this court must re-evaluate the evidence and proceedings leading to the conviction and reach its own conclusion on the matter.

8. The main contention by the Appellant is that his plea of guilty was never un-equivocal, and that the consequences of the plea of guilty were not explained to him by the court. It is trite that before a plea of guilty can be entered upon a guilty plea by the accused person, the court must be satisfied that each and every element of the charge is read to the accused in a language which the accused clearly understands. Further the court must explain to the accused person the consequences of the guilty plea so that the accused knows exactly what to expect. The issue in this appeal is whether or not the honourable trial Magistrate did that.

9. I have looked at the court proceedings of 21.9.17 and 25.9.17. On 21.9.17 when the charges were first read to the appellant he responded as follows:-

> ***To the Main Count – Sikumguza mahali popote.***
>
> ***Alternative Count – Ni ukweli.***

10. From the proceedings it appears that the Honourable trial Magistrate was not absolutely sure that the Appellant understood the charge or the consequences thereof and the court decided to relist the matter for 25.9.2017 for purposes of facts.

11. On 25.9.17, the facts of the charges were again read to the appellant and consequences of a guilty plea explained to him. He responded as follows:-

> ***Sikumuingia, ziliguzana tu.***

12. After that the facts were read to the Appellant and relevant exhibits produced including treatment notes. The Appellant was again asked to respond to the facts. He responded as follows:-

"Sehemu yangu ya siri iliguza sehemu yake ya kuenda choo, lakini sikuingia ndani."

13. The court then entered a plea of guilty. The issue is whether or not the plea was unequivocal and whether the consequences of a plea of guilty was explained to the Appellant. I have carefully considered the proceedings. To begin with the plea was read in the Kiswahili language which the Appellant stated he understood. Further record shows that the court explained to the Appellant the consequences of guilty plea. The plea itself was taken on 2 different occasions and on each occasion the Appellant pleaded guilty. It is critical to understand that language may convey different meanings on different occasions. However on the 3 occasions the Appellant was asked to plead he variously stated as follows:-

(1) - Sikumguza mahali popote - Count 1

- Ni ukweli. - Count 2

(2) - Sikumuingia, ziliguzana tu.

(3) – Sehemu yangu ya siri iliguza sehemu yake ya kuenda choo, lakini sikuingia ndani.

14. In my view, these pleas are clearly consistent with a plea of guilty and more so consistent with the elements of both the main charge and the alternative charge. However, the Honourable trial Magistrate took the path of caution, and only entered a plea of guilty on the alternative count. To alternative count the Appellant had pleaded "ni ukweli" on 21.9.17. Again on 25.9.17 the plea of guilty to alternative count is not in doubt.

15. It is the finding of this court that the charge was read to the Appellant in a language which he clearly understood, and that the consequences of a guilty plea were explained to him by the court. It is further the finding of this court that the plea of guilty entered for Count No. 2 was procedural and that the conviction based on that plea was lawful and sustainable.

16. The Appellant also states in his grounds of appeal that he was not given a chance to mitigate. However, proceedings show that the court gave him chance to mitigate and he stated that he needed the court to help him since he was only 25 years. It is clear that the court considered the Appellant's mitigation.

16. The other ground of appeal is that the sentence meted out of life imprisonment is too harsh. On that point the court accepts the Appellant's submissions that he cooperated with the court, that he is a first offender, and that the court ought to have been lenient in sentencing him.

17. This court notes that Section 11 (1) of Sexual Offences Act No. 3 of 2006 provides that a person convicted of offence of indecent act with a child is liable to imprisonment for a term not less than ten (10) years. Therefore, 10 years being the minimum sentence the trial Magistrate was right to render a life sentence in this matter. However in the same breath it is the finding of this court that the said life sentence was too harsh. The Appellant pleaded guilty, was a first offender, and also appeared remorseful. Life in jail was too harsh a punishment in this matter, and considering that the court only convicted the Appellant on Count No. 2.

18. Pursuant to the foregoing paragraphs of this Judgment the appeal partly succeeds, and judgment is entered as follows:-

(i) The Judgment of the trial court on conviction is upheld.

(ii) The sentence of life imprisonment is hereby reversed and set aside. The same is replaced by a term of ten (10) years in prison from the date of conviction.

Right of appeal within 14 days.

Delivered, dated and signed in open court at Kakamega this 13th day of September, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

State Counsel – Mr. Ongige

Appellant -

Court Assistant – Mr. Erick