REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 65 OF 2018

MOSES WAMBUGU NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Limuru Senior Principal Magistrate's Court Criminal Case No.823 of 2017 by Hon. S.A. OGOT (RM) on 15/3/18)

J U D G M E N T

1. The Appellant, **Moses Wambugu Ndungu,** was charged with the offence of **attempted defilement** contrary to **Section 9(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars being that on **21st** day of **December, 2017**, in **Limuru sub-county** within **Kiambu County** attempted to penetrate the vagina of **AWW.** a child aged **9 years** with his penis.

2. 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 Offences Act No. 3** of **2006**. Particulars of offence being that on **21st** day of **December, 2017**, in **Limuru sub-county** within **Kiambu County** attempted to penetrate the vagina of **AWW** a child aged **9 years** with his penis.

3. At the outset he denied the charges but later changed plea and admitted having committed the offence of defilement. He was convicted and sentenced to **twelve (12)** years imprisonment.

4. Aggrieved, he appeals on grounds that:

- **That** the learned magistrate erred in both law and fact in convicting the Appellant on a plea of guilty that was equivocal and/or not properly taken, offending provisions of **Sections 207** of the **Criminal Procedure Code.**
- **That** the learned trial magistrate erred in both law and fact in failing to take such precaution and administer such warning so as to ensure that the Appellant understood the nature and the consequences of the charge he was pleading to before he entered a plea of guilty and thereon sentence the Appellant.
- **That** the learned trial magistrate erred in both law and fact in failing to appreciate that the Appellant who is a typical Kikuyu may not have properly understood the language used by the court (*sic*) English/Kiswahili and further on the basis that the Appellant was unrepresented before court, occasioning miscarriage of justice. **That** the learned trial magistrate erred in both law in meting out a sentence that was manifestly harsh and excessive in the circumstances of the case.

5. At the hearing the Appellant canvassed the appeal by way of written submissions. He complained that he was coerced to admit the charge, he was not conversant with the language used and that the sentence imposed was harsh.

6. The **State** through learned counsel, **Mr. Mokua** opposed the appeal. He urged that the appellant pleaded guilty after the charge was read to him the fourth time. That the consequences of a plea of guilty were explained to him on all the occasions and the sentence imposed is the minimum prescribed sentence for the offence.

7. This being a first appeal I am duty bound to reconsider what transpired before the trial court and come up with my own conclusions. I must consider in the circumstances if indeed what transpired amounted to a plea of guilty.

8. The law in respect of plea taking is stipulated in **Section 207** of the **Criminal Procedure Code** that provides thus:-

> ***"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.***

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

(5) If the accused pleads—

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge."

And the procedure to be adopted in doing so was restated in the case of ***Adan vs Republic [1973] E.A. 445*** thus:

"(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 to 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."

9. Upon arraignment in court the charges were read to the Appellant in Kiswahili language that he was stated to have understood and he responded in Kiswahili language denying the charges. When the matter came up for pre-trial directions on the **19/1/18** the communication was in Kiswahili. The Appellant made an application to be produced before the trial court with a view of making an application. A prayer that was granted. Subsequently he was produced on the **26/1/18** when he informed the court his intention to change plea. On that particular date the charges were read and he admitted. The court *suo moto* notified him of the consequences of being convicted of the offence that he was facing. In response the Appellant expressed his intention to admit the charge, he responded thus:-

"It's ok. I still plead guilty."

The trial court that seemed to be in doubt of his mental status ordered him to be taken for a mental assessment. According to the report of **Dr. F.R. Owiti,** Consultant Psychiatrist, he had no evidence of mental illness therefore was declared fit to plead.

10. Subsequently, on **5/3/18** the charge was read to him and the consequences of pleading guilty to the charge were explained to him and he admitted the charge. The response was recorded in his own words that were stated in Kiswahili language. On the material date facts of the case were not presented because the prosecution did not have the police file.

11. When the case was brought up on the **15/3/18**, the charge was read out to the Appellant in Kiswahili a language that he understood and spoke and the response he gave was recorded verbatim. Facts of the case were presented thus:

"On 21/12/17, the complainant AWW a child of 9 years had been left at home at* [Particulars Withheld] *village and the accused herein had been give n casual work to plough the shamba by mother of complainant. The accused while at shamba called the complainant to the shamba on pretext that he wanted to send her. When the complainant got where accused was, the accused held her by her hand and took her to the bush near the shamba. He removed her trouser and her panty and he tried to defile her but he could not manage due to age of the child. The accused on not being able to penetrate he left the child at the forest/bush and threatened her not to tell anyone. When mother of complainant IWM came, she found that her daughter's mood was off and something was disturbing her. She wanted to know what was disturbing her and complainant told her what accused had done. That is when mum went to Tigon Police Station, reported and gave treatment note referring her to Tigoni District Hospital. On 22/12/17 they were given a P3 form and filled by doctor. On 23/12/17 the accused was arrested and on 27/12/17 he was brought to court and charged. I have P3 form dated 22/12/17 and wish to produce as exhibit 1. I would also like to produce copy of clinic cared that show complainant child was born on 9/5/08 and produced as exhibit 2. That is all"

Appellant respondent thus:

"Hayo Maelezo ni ya kweli."

And mitigated thus:

"I have never done anything like that before since I was born. Therefore, ask for forgiveness. That is all."

12. This was an unequivocal plea. The court was cautious, it took time to explain to the Appellant the consequences of admitting the charge and gave him requisite time to reflect on the same and he remained adamant. His conscience directed him to admit what he had done.

13. The fact that the preferred language of communication of the Appellant was Kiswahili, he is precluded in alleging at the appellate stage that he did not understand it. He cannot purport to have been a victim of police manipulation because at the point of changing plea he was not in police custody but under the protection of the court. He alleges that he was under the impression that he would benefit from a non-custodial sentence having been duped by the police but the record is clear, the court explained to him severally the consequences of pleading guilty.

14. It is also the contention of the Appellant that the sentence was harsh in the circumstances. Principles of interfering with sentence were stated in the case of **Bernard Kimani Gacheru vs Republic (2002) eKLR** thus:

"It is now settled law, following several authorized by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

15. In the premise's I confirm the conviction, but set aside the sentence meted out which I substitute with a period of **ten (10) years** to be effective from the date of conviction and sentence by the trial court.

16. It is so ordered.

Dated, Signed and Delivered at Kiambu this 12th day of September, 2019.

L. N. MUTENDE

JUDGE