



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII HIGH COURT
CRIMINAL APPEAL NO. 26 OF 2016

ORIGINAL CRIMINAL FILE NO. 792 OF 2016 AT KILGORIS

BETWEEN

FREDRICK OWEGI OWITI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and the sentence of the subordinate court of 10 years imprisonment at Kilgoris Law Court before R. M Ogada SRM, the judgment delivered on the 19th day of June 2016)

JUDGMENT

1. Fredrick Owegi Owiti hereinafter referred to as the appellant being aggrieved and dissatisfied with both the conviction and sentence of 10 years imprisonment that was imposed by the trial court at Kilgoris has appealed against the same and filed a petition on the 4th July 2016. The appellant was convicted of the offence of Defilement contrary to Section 8(1) (2) of the Sexual Offences Act No.3 of 2016. The appellant's grounds of appeal are as follows;

- i. That he pleaded guilty to the charge due to laymen ship, inducement , lured and lack of a defence counsel whereby he was supposed to be guided by the trial court as stipulated in the Constitution Article 49 (2) (c) & (d).
- ii. That he was not informed of his right to get an advocate to represent him at the time the plea was taken as provided under Article 50 of the Constitution.
- iii. That the trial court did not give any consideration to his mitigation which would have added more weight on my plea and therefore erred both in law and fact substantially.
- iv. The appellant seeks that his appeal be allowed, conviction quashed and the sentence of 10 years imprisonment set aside.

2. In what he calls his Grounds of Mitigation filed on the 14th June 2018 he states that this court should exercise its discretion and to reduce the sentence for a lighter one or a non-custodial sentence. That he is now a reformed person. The rehabilitative elements of the corrective system have assisted me to know and understand my calling in life.

3. At the hearing of the appeal Mr. Otieno for the State conceded to the appeal. He submitted that the plea was taken correctly and the appellant pleaded guilty. However in his mitigation he negated the plea of guilty by saying , “ *the girl told him she was 19 years and did not look like a school going student and he also alleged she had an I/D Card.*” That this amounted to changing his plea to not guilty as he was raising a defense which defense is provided for by the Sexual offences Act Section 8 (5) (a) & (b) which provides that it can a defense if the child deceived the accused that she an adult and the accused believed this. That Trial Magistrate should have entered a plea of not guilty. It was submitted that the conviction be quashed and sentence set aside. That the court can order a retrial as the appellant was convicted in 2016 or set him free.

DETERMINATION

4. I have considered the submissions by the appellant and the State Counsel together with the record of the Lower Court. The record shows that the appellant on being informed of the charge he replied, “True”. He pleaded “Not guilty” to the alternative charge of “Indecent act with

a child contrary to Section 11 (1) of the Sexual Offence Act No. 3 of 2006. The facts were read to him and he replied, "Facts are correct". The trial court thereafter convicted him on his own admission. The appellant stated the following in mitigation, "I met the girl in town, she did not look like she is a school going student. She told me that she wanted to rewind but the sponsor had refused to pay. She told me she was working in a certain shop where she was working. She told me she is 19 years. Her mom had her ID, already to her. She also told me that she had a certain man known as Frank. She wanted to be with me. I am a student of Kenya Aeronautical College in Nairobi." The court considered the plea in mitigation and then sentenced him to 10 years imprisonment.

5. Section 8 (5) (a) of the Sexual offences Act provides that it is a defence to a charge under this section if—

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years

6. The appellant in his mitigation was raising a defence as he stated that the girl told him she was 19 years old and that her mother had her ID card. The trial court at that moment should have entered a plea of not guilty and set down the case for hearing. I therefore find that the conviction was unsafe. The conviction and sentence is hereby set aside.

7. The next issue is whether the appellant should be subjected to a re-trial. In the case of **Fatehali Manji vs. Republic 1966 (EALR)** at page 343 the Court of Appeal set down the principles which a court should consider when considering to order a retrial. The court stated as follows;

"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should be made where the interests of justice require it.

8. Having considered that the Trial Magistrate erred in convicting the appellant I find that the original trial was defective. Am guided that each case must be considered on its own facts. The offence the appellant was charged with is a serious offence which carries a sentence of up to 15 years imprisonment if he is found guilty. The appellant was convicted on 26th of June 2016, it is just about 2 years since his conviction and in my view the witnesses can be found so that the matter is heard and determined on the evidence to be adduced. I find that this is an appropriate case for retrial. The accused shall be remanded in custody and presented before the Principal Magistrate's Court at Kilgoris for plea taking, bail application and setting down of the case for hearing. Appellant to be presented before the trial court on the **25th of July 2018** at 9am. The Deputy Registrar to return the Lower Court file to Principal Magistrate's Court at Kilgoris forthwith. The Trial Court to expedite the hearing of the Criminal Case. It is so ordered.

Dated signed and delivered this 20th Day of July 2018.

R.E.OUGO

JUDGE

In the presence of;

Appellant in person.

Mr. Otieno for the State.

Ms Rael Court/ clerk