REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

CRIMINAL APPEAL 29 OF 2017

SHABAN MOHAMMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence of Hon. C.M.Maundu SRM

delivered on 21st September 2015 in Criminal Case No. 1382 of 2014

in the Senior Principal Magistrate's Court at Kwale)

JUDGMENT

1. The Appellant was convicted on his own plea of guilty and sentenced to serve ten years imprisonment for the offence of an indecent act with a child, contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 29th December 2014 at 15.45hrs within [Particulars Withheld] Sub-Location, Waa Location of Kwale County within Coast Region, the Appellant intentionally touched the vagina of S M, a girl aged 4 years with his penis.

2. The Appellant was arraigned in the trial court on 31st December 2014 when he pleaded not guilty of the charge. The trial commenced and five prosecution witnesses testified. On 21st September 2015, after cross-examining the fifth prosecution witness, the Appellant indicated that he wanted to change his plea. He then pleaded guilty to the charge after it was read out to him, and was convicted on his plea of guilty.

3. The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The appeal proceeded to hearing on 4th September 2018 and the Appellant indicated to this Court that he would rely on the Grounds of Appeal he had filed together with his Petition on 21st December 2016, and he would be appealing both the conviction and sentence.

4. The grounds of his appeal are as follows:

a) That the trial magistrate erred in law and in fact by finding for his conviction and sentence without considering that the sentence of ten years imprisonment was not safe as the charge of indecent act was not proved.

b) The trial magistrate erred in law and in fact by finding for his conviction and sentence without considering that the doctor's evidence does not support the Prosecution's charge

c) That the trial magistrate erred in law and in fact by finding for his conviction and sentence without considering that the prosecution did not prove their case beyond any reasonable doubt.

d) That the trial magistrate erred in law and in fact by finding for his conviction and sentence without considering the Appellant's reasonable defence statement.

5. In summary, the Appellant submitted that the evidence showed that the complainant had not been defiled and that nothing was done to her. Therefore that he was convicted wrongly.

6. Mr. Jami Yamina, the learned prosecution counsel, also made oral submissions wherein he opposed the appeal, stating that the Appellant had been convicted and sentenced on his own plea of guilt. The counsel pointed out that section 348 of the Criminal Procedure Code states

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

7. Further, that the plea and facts were read to the Appellant in a language he understood which was Kiswahili, and that he admitted that his penis touched the complainant's vagina. Mr. Yamina also implored the Court to rely on the P3 form and age assessment report that had been produced as exhibits in the proceedings prior to the taking of the plea, and to take into account the circumstances in which the offence was committed when considering the sentence, as allowed under section 43 of the Sexual Offences Act. In particular, that the victim was a child and incapable of appreciating the nature of the offence.

8. Lastly, the counsel submitted that in the event that the Court finds there was a defect in taking of the plea in the trial Court, it considers a retrial in the interest of justice. In this regard, the counsel contended that the Prosecution will not have any advantage over the Appellant as they had produced all their exhibits during the hearing, and no prejudice will be suffered by the Appellant as he has been in custody for 3 ½ years and the minimum sentence for the offence was ten years, and the prosecution witnesses will be readily available at the retrial.

9. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

10. I have considered the arguments by the Appellant and Prosecution, and I am alive to the provisions in section 348 of the Criminal Procedure Code that no appeal shall be allowed in the case of an accused person who pleaded guilty, and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence. I therefore find that the issues for determination by the court are firstly, whether the plea of guilty by the Appellant was unequivocal; secondly, whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute; and lastly, whether the said sentence is amenable to reduction and /or variation.

11. The procedure to be applied in taking a plea of guilty were well enunciated in the case *of* **Adan vs Republic, [1973] EA 445** where the Court held 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."***

12. The procedure as laid out in ***Adan vs Republic*** (**supra**) is also provided for under *section 207* of the Criminal Procedure Code which provides as follows:

> **(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.**

13. Coming to the present appeal, the record of the trial Court shows that after the Appellant decided to change his plea, the proceedings continued as follows:

> **"ACCUSED: I wish to change my plea**
>
> **COURT: Charge read over and explained to accused person in Kiswahili which he understands.**

ACCUSED : It is true I touched the complainant's vagina with my penis

COURT: Plea of guilty entered. Hearing on 21/9/15

C. M. MAUNDU (SPM)

COURT PROSECUTOR : The facts are that on 29/12/2014 at 1545 hours the mother of the complainant one F M left her daughter and her son at home. She went to the market, the daughter one S M and her brother S followed her. On the way they met with the accused person. He gave Suleiman shs.5/= to go and buy juice. The accused remained with the complainant. The accused got hold of the complainant. He tried to defile her. When S returned he met the complainant crying. She told him that the accused person urinated on her. Their mother came she met the complainant with a lollipop. She was crying. She told her that the accused person urinated on her. The mother reported to the village chairman. The chairman arrested the accused person. He was escorted to Kombani road block. Police officers escorted the accused to Kwale police station. Complainant was taken to Kwale District hospital. She was examined and her P3 form filled. Accused charged with the present offence.

C. M. MAUNDU (SPM)

21. 9. 15

ACCUSED: The facts are correct.

COURT: Accused person is convicted on his own plea of guilty.

C. M. MAUNDU (SPM)

21. 9. 15

MITIGATION: I plead for forgiveness. I am an orphan.

SENTENCE: Mitigation noted. Accused person is sentenced to ten (10) years imprisonment.

C. M. MAUNDU (SPM)

21. 9. 15

Right of Appeal 14 days. "

14. The applicable law requires that the prosecution outlines the facts upon which the charge is founded after a plea of guilty is entered. I note in this regard that the prosecution in the facts that were given in the trial Court stated that the complainant indicated that the Appellant "urinated on her". The offence of committing an indecent offence with a child is provided for in section 11(1) of the Sexual Offences Act which provides as follows:

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

15. An indecent act is defined in section 2 of the said Act as an unlawful intentional act which causes—

"(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will".

No facts were given by the prosecution in relation to any contact between a part of the Appellant's body and the complainant, the nature and effect of the said urination of the Appellant on the complainant, and specifically no P3 form was produced in this respect. In addition no proof of the complainant's age was provided by the Prosecution in its facts to prove that the complainant was a child.

16. Consequently, the facts showing that the essential ingredients of the offence of an indecent act with the child needed to have been given by the prosecution, and explained to the Appellant in a language and manner that he understood, for him to have an opportunity to admit or challenge the same. I therefore find that the Appellant's plea of guilty was not unequivocal to this extent, and the sentence imposed upon him was also unlawful in the circumstances.

17. The Prosecution has sought a retrial , and the principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the

conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up 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 particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.*"*

18. In **Mwangi v Republic [1983] KLR 522** the Court of Appeal also held thus:

> **"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."**

19. I am convinced that this is not a proper case for retrial. I have in this regard particularly noted that the facts put forward of the offence of indecent act with a child was insufficient and the Appellant may thus be prejudiced if an opportunity is given to the Prosecution to provide fresh facts and evidence at a retrial . Lastly, I also note that section 43 of the Sexual Offences Act that was relied upon by the Prosecution details when acts are deemed to be unlawful and intentional, and is largely inapplicable to the circumstances of this appeal.

20. I accordingly allow the Appellant's appeal and quash his conviction for the offence of an indecent act with a child, contrary to section 11(1) of the Sexual Offences Act. I also set aside the sentence of ten years imprisonment imposed upon him for the said conviction.

21. It is so ordered.

DATEDnAND SIGNED AT MOMBASA THIS 5TH DAY OF SEPTEMBER 2018.

P. NYAMWEYA

JUDGE