



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. 9 OF 2018**

**ERICK OTIENO ANYONA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Cases No. 21 of 2017 delivered on 01/08/2017)*

**JUDGMENT**

1. The Appellant herein, **Erick Otiemo Anyona**, was charged with defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** No. 3 of 2006. He was also charged with an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** No. 3 of 2006.

2. On 01/08/2017 the Appellant admitted the charge and a plea of guilty was entered. The facts of the case followed immediately. After being warned of the possible penal consequences and on being asked to respond to the facts the Appellant admitted that he engaged in sex with the complainant, that he was 20 years old, that he knew the complainant was a minor aged 13 years and that he persuaded the complainant and consented to the sexual act.

3. The Appellant was convicted on his own plea of guilty and sentenced to 20 years imprisonment.

4. On 17/04/2018 the Appellant preferred an appeal against both conviction and sentence, with the leave of this Court, which appeal is the subject of this judgment. He preferred the following three grounds of appeal: -

***1. THAT the trial magistrate erred in law and facts by convicting and sentencing me without considering that the facts of the case were not read to me.***

***2. THAT the trial court erred in law by convicting and sentencing me without considering that I was not informed on the consequences of pleading guilty to the charges.***

***3. THAT the trial magistrate erred in law and facts by convicting and sentencing me without putting in mind that I was not given an opportunity to mitigate given the facts that I pleaded guilty.***

5. Directions were taken and the appeal was heard by way of oral submissions. The Appellant who appeared in person submitted that he had been misled by the police to plead guilty to the charge and that he was not versed with court procedures. He prayed for a retrial of the case. The State opposed the appeal.

6. As this is the Appellant's first appeal, the role of this appellate Court of first instance is to satisfy itself that the plea was unequivocal and in compliance with the **Constitution** and the law.

7. The record of the proceedings before the subordinate court has been availed before me and I have carefully perused the same. This court has also carefully considered the submissions of the parties on record.

8. The law on this subject is well settled. **Section 207** of the Criminal Procedure Code states as follows:

***'207 (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 plea agreement;***

*(2) If the accused person admits the truth of the charge otherwise than by 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.'*

9. The above provisions have previously been subject to Court's interpretation. And, in particular the procedure and steps to be taken in taking a plea of guilty were clearly laid down in the case of Adan -vs- Republic (1973) EA 445 and in the Court of Appeal case of Kariuki -vs- Republic (1954) KLR 809 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 take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.*

*(iv) If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.*

*(v) If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.*

10. In the case of Kariuki -vs- Republic (supra) the Court went on and stated that: -

*"The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading."*

11. In the case of Atito -vs- Republic (1975) EA 278 the Court also held that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence.

12. Upon the promulgation of the Constitution of Kenya in 2010, the people of Kenya gave unto themselves an elaborate Bill of Rights under Chapter Four thereof. **Article 50** thereof deals with the right to a fair hearing and in **sub-article (2)(b)** it states that: -

*"(2) Every accused person has the right to a fair trial, which includes the right-*

*(a).....*

*(b) to be informed of the charge, with sufficient detail to answer it.*

13. To therefore satisfy the above constitutional and statutory requirements, the Court when faced with a guilty plea scenario is called to exercise extreme care especially when the offence(s) involved carry serious legal penalties or are technical in nature more so when the accused is unrepresented. The Court is called upon to ensure that the charge is read and explained to the accused person in such sufficient detail to enable the accused person to make an informed decision and to plead with such knowledge and information about the charge. All that must be clearly captured in the record including the language which the accused communicates in.

14. Another equally important aspect relates to the taking of the facts of the case. The purpose of the facts is to establish the ingredients of the offence before Court. It is the duty of the Court to scrutinize and be sufficiently satisfied that indeed the facts, as presented, do establish the ingredients of the offence. It is not enough for a Court to proceed and enter a conviction simply because the accused has admitted the facts, the facts must establish the commission of the offence. The Court should therefore endeavor to be fully satisfied that the facts truly connect the accused to the commission of the offence and that there appears no cause to the contrary as so clearly provided under **Section 207** of the **Criminal Procedure Code**. (See: Kakamega High Court Criminal Appeal No. 46 of 2014 Dishon Malesia vs Republic (2014) eKLR).

15. The record before the trial court is very clear. The charges were read to the Appellant in Dholuo language. The Appellant admitted the charge.

16. On whether the facts proved the ingredients of the charge of defilement or the alternative charge of committing an indecent act with a child, I have equally analyzed the facts as presented before court and the same are clear that the offence of defilement was proved. The charge was not technical. It was on whether the Appellant had sexual intercourse with the complainant and he replied with such a clear explanation of what he did until he had sex with the complainant. The Appellant even knew the age of the complainant and that she was a minor, but relied on his art of persuasion and eventually had sex with her. He did not raise any issue even after being warned by the court of

the possible harsh penal consequences.

17. I have therefore carefully considered all the grounds of appeal and do not see how the plea was not unequivocal. I am satisfied and therefore find and hold that the Appellant understood the charges and their particulars as well as the facts thereof and that there was no hinderance to the process of plea taking. The facts and the evidence produced demonstrated the age of the complainant, penetration and that the Appellant was the assailant. The plea was hence unequivocal. The appeal on conviction therefore fail.

18. On sentencing, **Section 8(3)** of the **Sexual Offences Act** imposes the minimum sentence on conviction at 20 years imprisonment when the age of the victim is between 12 and 15 years old. An age assessment report was produced and the Appellant did not object to alongside several other documents. The Report settled the age of the complainant at 13 years old. I have perused the report and seen what was considered to arrive at the age. The officer used the Tanners method and assessed the physical development of the victim to arrive at the age. The court then received mitigations and sentenced the Appellant to the minimum sentence.

19. As the plea was unequivocal and the sentence lawful, the appeal is hereby dismissed. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 4<sup>th</sup> day of October, 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Erick Otieno Anyona**, Appellant in person.

**Joseph Kimanthi**, Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Evelyne Nyauke** – Court Assistant.