REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 90 OF 2015

NAHASHON KIPKEMEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Resident Magistrate Honourable G. Adhiambo in Kapsabet Criminal Case No. 1522 of 2015 dated 12th March, 2012)

JUDGMENT

NAHASHON KIPKEMEI was charged in the lower court with the offence of defilement in violation of *Section 8(1)* as read with *Section 8(4)* of the *Sexual Offences Act No. 3 of 2006.*

The particulars of this offence are that on the 27th day of June 2015 within Nandi County, the appellant intentionally and unlawfully did cause his penis to penetrate the vagina of *P J* a child aged 17 years.

In the alternative, the appellant faced a charge of Indecent Act with a child in violation of *Section 11(1)* of the *Sexual Offences Act No. 3 OF 2006.*

The particulars hereof being that on the 27th day of June, 2015 within Nandi County, the appellant unlawfully and intentionally did cause his penis to come into contact with the vagina of *P J*, a child aged 17 years.

The charge was read over and explained to the appellant in Swahili to which the appellant responded, "it is true". The court entered a plea of guilty. This was on 6th July, 2015. The prosecutor prayed for mention on 7th July, 2015 so as to avail exhibits and state the facts. The court allowed the application.

On 7th July, 2015 the facts were read in English and interpreted in Swahili by *Miss Winny.* The facts as read then are that on 27th June, 2015 at around 6.00 p.m the complainant *P J*, who was a form 1 student at [particulars withheld] Secondary school and was living with her uncle at [particulars withheld] area, decided to go and visit her mother at [particulars withheld] village. On her way she met the appellant who was her school mate at [particulars withheld] secondary school.The appellant was then riding a motor cycle. The appellant convinced the complainant to accompany him to his house.On reaching they stayed for about 2 hours at the house of the appellant. The complainant told the appellant to escort her to her destination. The appellant refused to escort the complainant upto her mother's house. On 28th June, 2015, the mother of the complainant rung the uncle of the complainant, asking him why the complainant did not visit her immediately. The uncle of the complainant went to Kilibwoni police station and reported the disappearance of the complainant.

On that very same day, at about 1.35 p.m, the complainant went to the mother's home and the mother interrogated her. The complainant and her mother went to the home of the uncle and then to Kilibwoni police post. The mother and the uncle of the complainant talked to the complainant and the complainant said that the accused occasioned his penis to enter her vagina. They reported the case at Kilibwoni police station. Investigations were done. The complainant was taken to Kilibwoni Sub-County Hospital where she was treated. She was issued with a P3 form of which was filled. The appellant was arrested and charged.

The laboratory test for the complainant results was produced as exhibits 1a, P-3 form Exhibit 1b and Certificate of Birth showing she was born on 23rd December, 1997, Exhibit 1c.

To these facts, the appellant responded,

> ***"It is true".***

The court convicted him on his own plea of guilty.

The prosecutor indicated that he was a first offender.

In mitigation the appellant said,

> ***"I did not force her. I never refused to escort. She brought herself to our house. I never went to bring her. I want to complete my education. I was to become a police officer like my father. That is all I have to say".***

The court after considering the mitigation and the circumstances under which the offence was committed expressed sympathy with the appellant and sentenced him to the mandatory minimum sentence for the offence which is 15 years imprisonment.

The appellant dissatisfied with the said conviction and the sentence, appealed to this court through his advocate, on the grounds that:-

(1) Remorsefulness of the Appellant was not considered.

(2) The Birth Certificate No. [particulars withheld], authenticity was not interrogated.

(3) The maker of P3 form was not called as a witness

(4) Receipts relating to Birth Certificate were not called for.

(5) The language of the court was not indicated.

(6) Proceedings were not interpreted to the appellant in a language which he understands.

(7) The appellant was not admitted to bond/bail on 16th February 2015.

(8) The complainant by her looks, height and body weight, appears as a mature adult and the appellant was not under duty to request or demand for her identification card.

(9) The complainant was not called for hearing and during sentencing.

(10) Complainant was not summoned to attend court.

The appellant's advocate put in written submissions and just as reflected by the grounds of the appeal raised issues which would be material and of consideration if the matter had gone to full hearing.

Apart from the case of ***Adan –vs- Republic [1973] EALR 445*** of which is on plea taking, other relied on authorities are of cases which had gone to full hearing of which distinguishes them from this case where the appellant pleaded guilty. In this case, as an appellate court, I only need to consider whether the plea was unequivocal and whether the sentence was harsh and excessive given its circumstances.

The court's record indicates clearly that the proceedings were interpreted to the appellant in Kiswahili. From the onset he participated well, responding effectively whenever he was called to. He as well mitigated at length showing he was conversant with the language. Saying now that he did not well understand the language has no basis. As was rightly argued by the state, prosecutor on appeal, the court even on appeal was using the same Swahili language to the appellant, of which leaves no doubt that it is a language he well understands.

All the motions and processes of plea taking as were indicated in the case of ***Adan –vs- Republic [1973] EALR 445*** were meticulously followed by the trial court to the letter. However, there are two issues which were not rightly considered. One is that the statement of the offence and the facts were read on different dates. The statement of the offence or rather the charge were read on 6th July, 2015. The facts were however read on 7th July, 2015, the following day, without restating the charge to the appellant afresh. The facts of the case are supposed to disclose the offence the accused is charged with. When the charge and facts are read on different days, more so to a lay person to matters of law, such an accused person may be at loss in trying to connect the facts to the preferred charge, and is likely to plead to issues of which he does not understand very well. The best practice would be to state the charge and the facts in one flow.

The most crucial part of the read facts which was meant to disclose *"penetration"* states;-

> ***"The mother and the uncle of the complainant talked to the complainant and the complainant said that the accused occasioned his penis to enter her vagina".***

The expressed fact here is that the complainant said that and not that the appellant did what the complainant said. When the appellant responded to the statement together with the rest by saying it is true, it is questionable as to whether he was agreeing to the fact that complainant said as alleged or that he did what the complainant alleged. In such a scenario, the court is called to seek clarification from the accused so as not to render the plea equivocal. Such did not happen. In the case of ***Lebiringin –vs- Republic, Criminal Appeal No. 179 of 1973***, the court relying on Archbold expressed that it is important that there should be no ambiguity in the plea and care should be taken to make sure that the accused understands the charge and to ascertain to what the plea amounts.

In mitigation the appellant refuted some allegations in the read facts when he said,

"I did not force her. I never refused to escort, she brought herself to our house. I never went to bring her". Though what he said does not relate to the core ingredients of the offence, it amounts to saying part of the facts read is not correct. The court to ascertain the facts the appellant was accepting and those he was refuting, should have sought clarification from him, or simply entered a plea of not guilty at this stage. The way the plea stands as of now, it cannot be said that the appellant fully understood the charge and had no defence to it. This lead me to conclusion that the plea is equivocal. The appeal is merited. It is allowed. Conviction and sentence are set aside and a retrial ordered.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 11th day of October, 2018

In the presence of:-

(1) Appellant

(2) Ms Mokua for State/prosecutor

(3) Mr. Mwelem Court Assistant