REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO.174 OF 2016

BETWEEN

CALEB WAWIRE SIFUNA….....APPELLANT

AND

REPUBLIC….....RESPONDENT

(Appeal against Conviction and Sentence in Criminal Case No. 39 of 2016 in* Senior Principal Magistrate's Court at *Kimilili by Hon. D.O.Onyango (SPM) on 26.7.16)

JUDGMENT

The Trial

1. The Appellant herein **CALEB WAWIRE SIFUNA** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

> ***On 13.9.15 in Bungoma North District within Bungoma County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of NSS a girl aged 14 years***

2. The court record shows that Appellant was arraigned before the court on 11.7.16. When the matter was mentioned on 26.7.16, the appellant informed the court that he wished to change his plea. When the main charge was read out to him in Kiswahili, he replied:-

Accused – **"It is true."**

3. The prosecution proceeded to give facts as follows:-

> ***"On 18.9.15 the complainant SM aged 14 was sent by her parents to go fetch firewood. As she was in the forest she met accused who accosted her and engaged her in a conversation.The complainant rejected his advances. The accused used force to remove her skirt and inner pant. The complainant tried to scream but accused covered her mouth. The accused inserted his penis into her vagina and fled from the scene. The complainant reported the matter to her mother. The mother reported the matter to Mbakalo police station. The complainant was treated and examined at Kakame heath Centre. The doctor confirmed that she was defiled as her hymen was lacerated. I wish to produce the P3 form as Exhibit. Accused was later arrested and charged after witnesses recorded statements. .***

The Appellant replied;-

"The facts are true as read."

Court: And you knew she was 14 years old?

Accused: Yes I knew she was a minor

4. The learned trial magistrate proceeded to enter a plea of guilty against the accused and convicted him on his own plea.

5. The prosecution indicated that the appellant was a 1st offender. In mitigation, the appellant asked to be jailed near his parents in Kitale. In sentencing the Appellant, the trial magistrate had this to say;-

> ***"The accused does not look remorseful at all. He deserves a custodial sentence. The Accused to serve 30 years imprisonment."***

The Appeal

6. Aggrieved by this decision, the appellant lodged the instant appeal. In his amended grounds of appeal filed on 8.11.18, appellant raised 3 main grounds to wit:-

1. ***That his plea of guilt was not unequivocal***

2. ***That he was not availed to court within the stipulated time and no reason was given by the police***

3. ***That age of complainant was not proved***

7. When the appeal came up for hearing on 8.11.18, the appellant chose to wholly rely on the amended grounds of appeal and also on the written submissions filed on 8.11.18.

8. Mr. Oimbo, Learned Counsel for the state opposed the appeal and submitted that the charge was read to the appellate in a language that he understood and that the sentence imposed on him was lawful.

Analysis and determination

9. This is the first appellant court and as such I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

10. The appellant is appealing both on conviction and sentence. In the case of ***Adan vs Republic [1973] EA LR 445***, the court set out the steps to be followed by a court when taking plea**.** This was adopted in ***Kariuki vs Republic [1954] KLR 809*** where it was held:-

> ***"The manner in which a plea of guilty should be recorded is:***
>
> ***(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;***
>
> ***(b) he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;***
>
> ***(c) the prosecution may 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;***
>
> ***(d if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply".***

11. Courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. In the case of ***Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported)***, the court held as follows:

> ***"In those cases where there is an unrepresented Accused charged with a serious offence, care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence…..To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea."***

12. This position was reiterated in the case of ***Simon Gitau Kinene v Republic [2016] eKLR***.

13. In the case before me, the record shows that after appellant pleaded guilty, the court did not warn him of the seriousness of the offence that he was pleading to. In those circumstances, given the seriousness of the charge, the Court was about to convict and sentence the Appellant for, it was incumbent upon the Court to unequivocally warn the Appellant of the consequences of a guilty plea. This was clearly

not done.

14. I have considered whether the court should order a retrial and I find that to do so would give the prosecution an opportunity to fill the gaps in its case which will be prejudicial to the appellant. In arriving at this decision, I am fortified by the Court of Appeal decision in the case of ***John Njeru v Republic [1980] eKLR***, where the court held:-

> ***"In general, a retrial should be ordered only when the original trial was illegal or defective, as otherwise an order for retrial would give the prosecution an opportunity of filling gaps in its case; see Aloys v Uganda [1972] EA 469, which followed the earlier decision Fatehali Manji v The Republic [1966] EA 343. This is particularly so where the first trial has resulted in an acquittal".***

Decision

14. *Having considered the evidence in its totality, the appeal succeeds.* Accordingly, the conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that appellant shall be released and set free forthwith.

DATED AND DELIVERED IN BUNGOMA THIS....9th ....DAY OF....November....2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Ribba & Diannah

Appellant - In Person

For the State - Mr Oimbo