REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 146 OF 2017

NGOJA KOMBO..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

***(**An appeal against the original conviction and sentence of Hon. A. O. Aminga RM delivered on 17th August 2012 in Criminal Case No. 970 of 2012 in the Principal Magistrate's Court at Kwale)**

JUDGMENT

The Appeal

1. The Appellant was convicted and sentenced to serve twenty (20) years imprisonment for the offence of defilement, contrary to section 8(1) as read together with sub-section 3 of the Sexual Offences Act. The particulars of the offence were that in between the month of July – 14 th August 2012 at [Particulars Withheld] village in Kwale County within the Coast region, he intentionally and unlawfully committed an act which caused penetration of his penis to the vagina of S N, a child aged 12 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, based on the same particulars.

3. The Appellant pleaded guilty to the charge in the trial court on 15th August 2012, and on 17th August 2012, he was convicted of the main charge and sentenced on his plea of guilty. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Petition of Appeal and Amended Grounds of Appeal that he filed in Court on 4th September 2018 are as follows:

> a) That the learned trial magistrate erred in law and fact by convicting him to 20 years imprisonment on his own plea of guilty without considering that the plea was not unequivocal hence unsafe.
>
> b) That the learned trial magistrate erred by convicting him to 20 years imprisonment without considering that Article 50 (b)and (h) of the Constitution were violated.
>
> c) That the learned trial magistrate erred in law and fact by convicting him to 20 years imprisonment without considering that both the production of the P3 form and the age assessment report by the prosecutor was unlawful contrary to section 71 of the Evidence ct.
>
> d) That the learned trial magistrate erred in law and fact by convicting him to 20 years imprisonment without considering that the Appellant was partially deaf.

4. The appeal proceeded for hearing on 4th September 2018, and **t**he Appellant submitted that he would wholly rely on written submissions that he had availed to the Court. Mr. Jami Yamina, the learned prosecution counsel, made oral submissions.

5. The Appellant's submissions were that his plea of guilty was shown to have been recorded both in English and in Kiswahili in contravention of section 207 of the Criminal Procedure Code, and there was no name of an interpreter shown in the record. Further, that the facts were also read to him after two days of taking plea and were not explained to him by the trial magistrate, nor was he accorded legal representation in contravention of Article 50 (2)(b) of the Constitution.

6. Lastly, that that the P3 Form and age assessment report were not produced by their makers contrary to section 71 of the Evidence Act, and were not conclusive as to penetration by the Appellant or the age of the victim. The Appellant cited various judicial authorities in support of his submissions.

7. Mr. Yamina on his part testified that it was clear from the record that the proceedings were in Kiswahili and were recorded in and translated to English, and that the applicable rules do not require the proceedings to be recorded in Kiswahili. Furthermore, that the Appellant is not denying that he responded that it was true, or that the trial Court recorded him wrongly, or that he did not understand the Kiswahili language.

8. In addition, that the P3 Form and age assessment reports are not in the category of documents that require attestation under section 71 of the Evidence Act, and reliance was also placed on section 348 of the appeals from pleas of guilty.

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.

11. 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.

12. The procedure to be applied in taking a plea of guilty was 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."***

13. This procedure was reiterated by the Court of Appeal in **Kariuki vs Republic (1984) KLR 809** .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.**

14. Coming to the present appeal, the record of the trial Court shows that on 15th August 2012, the proceedings were as follows:

> **"15.8.12**
>
> **Before Hon. A.O. Aminga RM**
>
> **Court clerk – Dzillah**
>
> **Interpretation – English/Kiswahili**
>
> **The substances of the charges and every element thereof read and explained by the court to the accused person in the**

language he/she understands and on being asked whether he/she admits/denies the truth of the charge(s) relied in Kiswahili:

True

<u>COURT</u>: Plea of guilty entered.

<u>PROSECUTOR:</u> I am ready with facts. Accused was arrested yesterday . The complainant to undergo a review and filing of P3 form.

<u>COURT</u>: Mention on 17/8/2012 for facts. Accused to be remanded in Lunga Lunga Police Station in the meantime."

15. On 17th August 2012 the proceedings continued with the facts being given as follows :

"The complainant S N is aged 12 years and a class 4 pupil in [Particuars Withheld]primary school. Sometimes in July 2012 the complainant visted one Mbodze's homestead to greet her school mate K. She had obtained the parents permission to spend the weekend there. On the 2nd day, the accused noticed the complainant and proposed to marry her. He enticed her before taking her into his house where she spent the night. They had sexual intercourse. The complainant remained there until 10.8.2012 when the complainant's parents got worried when the complainant failed to return home after the 2 days. The minor was then traced to the accused place on 14.8.12 where both were found. The complainant was later rescued and treated as a child in need of care and protection under the Children's Act. She was taken to hospital where she was examined and treated. A P3 form was filled. She stayed with the accused for about a month.

I wish to produce the P3 form as exhibit – exhibit 1.

The Accused was also taken for medical examination and a p3 form filled – Exhibit 2.

The complainant's age was also assessed at 12 years. I produce the report as exhibit – Exhibit 3

16. It is evident from the said proceedings that there was an irregularity in the way the plea was taken. The elements of a charge, the particulars thereof and the facts giving rise to the charge are a package so to speak, when it comes to the recording an unequivocal plea of guilty. Consequently, the facts giving rise to the charge are required to be read immediately after the admission of a charge to ensure that the Accused person fully understands the facts that he or she is pleading to that constitute the offence he or she is accused of, and is still at liberty after the facts are read to dispute the same and plead not guilty. This also enables the trial court to relate the facts to the offence charged, and determine if they disclose the occurrence of the alleged offence, before proceeding to convict an accused person.

17. In the present appeal, it is evidence from the record that while the charge was read to the Appellant on 15th August 2012, the facts were read to him on 17th August 2018, and there is no record of the Appellant taking a fresh plea on that date. It is thus not evident to which charge the said facts related to.

18. In addition the facts adduced before the trial Court did not disclose the offence of defilement. Section 2 of the Sexual Offences Act in this respect defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person". The facts alleged that the Appellant and complainant had sexual intercourse. The elements of that sexual intercourse needed to have been stated with specificity, as it is not always the case that sexual intercourse is synonymous with penetration, hence the requirement and definition of penetration, which is required to be proved beyond reasonable doubt to establish defilement.

19. There was thus no evidence adduced of any acts of penetration of the complainant by the Appellant, and while the P3 form showed that the complainant's hymen was not intact, it is not proof as to the identity of the perpetrator of the penetration.

20. I therefore find for the above reasons that the Appellant's plea of guilty was not unequivocal, and the conviction of the Appellant for defilement was not safe. I accordingly quash the conviction of the Appellant for the offence of defilement, contrary to section 8(1) as read together with sub-section 3 of the Sexual Offences Act. I also set aside the sentence of twenty (20) years imprisonment imposed upon the Appellant for this conviction, and order that he be and is hereby set at liberty forthwith unless otherwise lawfully held.

21. It is so ordered.

DATED AND SIGNED THIS 29TH DAY OF OCTOBER 2018

P. NYAMWEYA

<u>JUDGE</u>

DELIVERED AT MOMBASA THIS 12TH DAY OF NOVEMBER 2018

D. O. CHEPKWONY

<u>JUDGE</u>