REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 81 OF 2016

(Appeal originating from the conviction and sentence by Hon. E.MICHIEKA SRM in Karatina S.O CASE NO. 1of 2015)

JOHN NGUNJIRI NDERITU.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

J U D G M E NT

The appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act no.3 of 2006. The particulars were that on diverse dates between 15th and 31st day of December 2014. At [particulars withheld] village, Ngandu location in mathira west Sub County within Nyeri County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of E W N a child aged 14 years.

The appellant initially denied the charge; after evidence of the second witness instead of cross examining the witness, the appellant changed plea. The appellant was convicted and sentenced to 20 years imprisonment. He filed appeal on both conviction and sentence. He raised three grounds of appeal set down hereunder:-

1. that the charge was defective and that the trial magistrate failed to caution him when he decided to plead guilty

2. that the trial magistrate erred in relying on the complainant who was mentally challenged

3. that the maker of DNA results never testified

The appellant submitted that he was not cautioned on the consequences of pleading guity.He said he pleaded guilty to avoid delay of the case. On the charges he said the section defining the offence and penalty section were combined making it an offence not known in law and prosecution failed to amend. He said that defect embarrassed the conduct of his case and it cannot be cured by section 382 of the criminal procedure code.

He submitted that there is no report produced to show that the complainant was mentally challenged. On DNA, notification of birth and p3 he said they were marked and not produced in court. He urged court to analyze the whole record and come up with a different conclusion.

The state contested the appeal on both conviction and sentence.Ms.Mwaniki for the state submitted that the appellant opted to change plea at a later stage after evidence of pw1 and pw2.she submitted that the appellant did change plea on his own volition and admitted that a child born by complainant was his child. She added that charges were read to him again in the language he understood. She submitted that by appellant admitting the charge he has no right of appeal on conviction but can appeal on sentence. She added that even in mitigation the appellant admitted and promised to take care of the child. She submitted that the complainant was 14 years and the issue of consent do not arise. She argued that plea was unequivocal; that the appellant understood the charges he was pleading to. She urged court to consider giving chance for retrial as there is overwhelming evidence, she submitted that the complainant was a minor aged 14 years with mental challenge and that the two witnesses who testified were the minor's grandmother and the guardian. She submitted that the doctor could not be called to produce DNA report as the appellant pleaded guilty. On the issue of the charge being defective she submitted that it is curable under section 382 of the criminal procedure code.

I have considered the above submission and what I wish to consider is whether the plea was unequivocal. As pointed out above, record show that the appellant changed plea after two witnesses testified, he changed plea after cross examining pw2.He said "I admit the child is mine. I wish to plead guilty" the record show that charges were read over and explained to the appellant in Kiswahili and he said "it is true". On 6/10/2016 and 10/10/2016 record show that the appellant was reminded of the charge again and he still admitted. Facts were taken as per evidence on record. Prosecution produced birth notification, DNA results and p3 form and the appellant said it is true. He was treated as first offender. In mitigation the appellant said he did not force the girl and that he did not know that she did not want it.He said he is ready to take care of the child born out of his sexual act with the minor. From record it is quite clear that the appellant was reminded of the charge more than once and on different days. In all occasion he admitted the charge saying "it is true".2 witnesses the mother and grandmother of the minor had testified and he had been given opportunity to cross examine them. He admitted that the evidence was correct. Even during mitigation he said he was ready to take care of the child born out of the sexual act. The reminder of charges were on different days and appellant still pleaded guilty. The appellant had opportunity to rethink and change his mind if he was not sure of what he pleading to. After admitting he said he did not know the girl did not want to have sex with him. He also said he is ready to take care of the child. In defilement consent from a minor is not defence so whether the child wanted or not is not an issue; an act of penetration of a minor's organ by a male organ amount to defilement whether there is consent from the minor or not. The notification of birth produced confirmed age of the minor as 14 years. p3 and DNA results confirm penetration. Appellant admitted the DNA results by saying "the child is mine". Responses from the appellant did not portray a person who did not know what he was pleading to. It is evident that the plea was unequivocal.

Having found that the plea was unequivocal, I now wish to consider the effect of failure to warn the appellant of the consequences of pleading guilty to a charge as this. Record do not show any warning. The appellant said he is a lay person. The appellant may not have known the kind of sentence likely to be imposed; but my question is, would that have changed the facts which record show he know as he pleaded? I do not believe so.The provision under which he was charged provide for a minimum sentence which the trial magistrate imposed after considering that the appellant was a first offender. I find that failure to warn does not render the conviction and sentence improper.

On charge being defective. I note that it indicated section 8(1) (3) instead of section 8(1) as read with section 8(3) first being defining the offence and the second being penalty section. Section 382 of the penal code provide as follows:-

…"no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice."

Record show that the appellant participated fully in the proceedings meaning he understood the charges

he was facing.

From the foregoing I find that the error did not occasion any injustice to the appellant as he understood the charges he was facing. I do not see reason for retrial.

Sentence imposed is the minimum for defilement of a girl aged between 11 and 15 years. I do not see merit in the appeal and do dismiss accordingly.

Dated and signed at Nairobi this……..day of……2017.

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RACHEL NGETICH

HIGH COURT JUDGE

Delivered at Nyeri this……19TH ……day of……JULY…...2017.

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JUDGE