



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO 445 OF 2013**

**(Appeal against Conviction and Sentence in Kigumo SPM Criminal Case No 211 of 2013 – E. M. Kagoni, Ag SRM)**

**STEPHEN KARIUKI MURAGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant, **Stephen Kariuki Murage**, was convicted upon his own plea, of **defilement** contrary to **section 8(1) & (2)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the particulars of the charge that on 27<sup>th</sup> February 2013 in Murang'a County, he intentionally caused his penis to penetrate the vagina of **A N K**, a child aged four (4) years. He was sentenced to life imprisonment. He has appealed against both conviction and sentence.

2. The Appellant's main grounds of appeal as they appear in his petition of appeal and supplementary grounds of appeal, and also as presented in his written submissions, are –

- i. That he pleaded guilty because he did not understand the charge.
- ii. That he was confused and in great fear as it was his first time to be arraigned in court.
- iii. That the complainant's father was the Appellant's employer, and there was a conflict between the two on account of the Appellant's unpaid salary arrears of six months.
- iv. That the trial magistrate erred in not cautioning the Appellant about the gravity of the offence.
- v. That the magistrate also erred in not ordering that the Appellant be examined on his general health status, and particularly whether he was of sound mind, before his plea was taken.
- vi. That the sentence was manifestly harsh and excessive.

3. In other words, the Appellant's complaint in this appeal is that his plea was not unequivocal for the various reasons he has set out in his grounds of appeal.

4. On her part, learned Prosecution Counsel, Miss Keya, supported the conviction. She submitted that the charge was read and explained to the Appellant in Kikuyu, a language he understood. He freely pleaded guilty. The facts were then given by the prosecution (on two occasions), which facts disclosed

the offence charged. Miss Keya further submitted that the age of the complainant was given in the charge sheet as 4 years, a fact verified in the medical report tendered by the prosecution. In her view therefore the plea was properly taken and the Appellant duly convicted. The plea was unequivocal.

5. As for sentence, Miss Keya submitted that life imprisonment was mandatory for the offence the Appellant stood convicted of, and was thus lawful.

6. Miss Keya also submitted that in any event the appeal was prohibited by law under **section 348** of the ***Criminal Procedure Code, Cap 75***, except for severity or legality of sentence.

7. The Appellant's reply was that when the plea was taken he was sick as he had a head-ache induced by a beating he had received from a mob at the time of his arrest.

8. I have considered the submissions. I will first consider the issue of section 348 of the Code which provides –

**“348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”**

This injunction obviously has application where the appellate court is satisfied that the plea, as taken, was proper and unequivocal. The appellate court must therefore first examine the plea to so satisfy itself and will not reject an appeal against conviction out of hand merely because the appellant was convicted upon his own plea!

9. In the present appeal the Appellant's complaint is that his plea was not unequivocal on account of the various reasons he has given. I must therefore examine that plea as recorded by the trial court.

10. In subordinate courts the procedure for taking plea is set out in section 207 of the Code which provides –

**“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 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.**

**(5) If the accused pleads –**

**(a) that he has been previously convicted or acquitted on the same facts of the same offence; or**

**(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to please to the charge.”**

11. The principles applied in plea taking were elucidated in *Adan v Republic {1973} EA 445* where the *Court of Appeal* held:-

(i) The charge and all the essential ingredients of the offence should be read 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 immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or 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 a change on 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.

12. In the present case the record of the trial court discloses that interpretation from English to Kikuyu was provided. The Appellant is a Kikuyu, and he presented his appeal in fluent Kikuyu. I am therefore satisfied that the charge was read and explained to him in a language he understood – Kikuyu, and that he understood the charge. He admitted the charge and a plea of guilty was entered.

13. Before convicting the Appellant the court required the prosecution to outline the facts of the case. Facts were given on two different occasions – first on the day of taking the plea, 06/03/2013, and subsequently on 18/03/2013 when the trial magistrate noted that she did not convict the Appellant on 06/03/2013. The facts as narrated by the prosecution, on their face, disclosed the offence charged (but more of this later). The Appellant admitted those facts. The same facts were repeated on 18/03/2013, and the Appellant again admitted them. He was then convicted.

14. I therefore find no merit in the complaint that the Appellant did not understand the charge. He had the opportunity on 06/03/2013 and also 18/03/2013 to make any complaints to court he may have wished, including that he had been assaulted at the time of his arrest. He did not. Almost two weeks later he had another opportunity to complain, but he did not. He could also have denied the facts. He admitted them.

15. There was also no requirement under the law for the trial court to caution the Appellant about the seriousness of the offence or the severity of the sentence, as long as the court was satisfied that he understood the charge and all essential elements thereof.

16. As for need to have him medically examined for general fitness or his mental status, I did not understand the Appellant to be arguing that he was of unsound mind when the plea was taken. Indeed when he presented his plea he appeared to be a young man of excellent health who was in full command of all his faculties.

17. Finally, if indeed the charge he faced was trumped up on account of an alleged conflict with the complainant's father over his unpaid salary arrears, he could simply have denied the offence, or raised the issue after the facts were given (which would have rendered his plea of guilty equivocal).

18. Having said all that however, there is an aspect of this case that has worried me. The offence of defilement is defined as follows in **section 8(1)** of the *Sexual Offences Act* –

**“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”**

19. Penetration is defined in **section 2** of the Act as follows -

**“Penetration means the partial or complete insertion of the genital organs of a person in the genital organs of another person.”**

**20.** In the course of giving facts, the prosecution produced in evidence a medical report in the form of a *Post Rape Care Form (MOH 363)* of the complainant. Medical personnel examined the complainant the day following the alleged defilement. They noted only some **laceration of the vagina**; otherwise the outer genitalia were normal, and **the hymen and anus were intact**.

**21. Was there any penetration, partial or full?** The laceration was indicative of an attempt at penetration; but I am not satisfied, from the medical evidence tendered by the prosecution, that there was either partial or full penetration. The medical evidence tendered by the prosecution did not disclose the offence of defilement charged. If the trial court examined the medical report tendered it should not have entered a conviction. It should have entered a plea of not guilty to enable the case to go to trial. The prosecution would then have had a chance to appropriately amend the charge or proceed as they may have thought best.

**22.** The conviction was illegal. In the result I will allow the appeal and set aside the conviction and sentence. The Appellant is referred back to the lower court for retrial. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 11<sup>TH</sup> DAY OF FEBRUARY 2016**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 12<sup>TH</sup> DAY OF FEBRUARY 2016**