REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 73 OF 2014

(Appeal against Conviction and Sentence in Gatundu SRM Criminal Case No 119 of 2014 – Kinyanjui, Ag SRM)

VINCENT KIMANI NJOROGE……..……...…….……APPELLANT

VERSUS

REPUBLIC…….…...…….RESPONDENT

J U D G M E N T

1. The Appellant in this appeal, **Vincent Kimani Njoroge,** was convicted upon his own plea of ***defilement of a child*** contrary to **section 8(1) as read with subsection (2)** of the **Sexual Offences Act, No. 3 of 2006.** It was alleged in the charge that on 29/01/2014 at [particulars withheld] Village in Gatundu North Sub-County within Kiambu County, intentionally and unlawfully, he committed an act that caused penetration with his genital organ, namely his penis, into the genital organ, namely the anus, of one IMM a child aged 7 years. He was sentenced to life imprisonment. He has appealed against both conviction and sentence.

2. The Appellant's grounds of appeal, as can be gathered from his "memorandum of grounds of appeal" filed on 29/05/2014 and supplementary grounds of appeal filed on 11/11/2015 when the appeal was heard, as well as his written submissions, are –

(i) That the medical evidence was not satisfactory.

(ii) That although he pleaded guilty, the consequences of such plea, given the gravity of the offence, were not explained to him, and that therefore his plea was equivocal.

(iii) That the charge as laid was defective in that he should have been charged under section 162 of the Penal Code.

(iv) That the provisions of Article 25 (c) of the Constitution of Kenya, 2010 were violated, and that therefore he should be retried.

3. In his submissions at the hearing of the appeal, the Appellant stated that he was hopelessly drunk at the time his plea was taken, having drunk some illicit liquor that some young men had brought into his cell at the police station, and that therefore he did not know what he was doing.

4. Learned Prosecution Counsel supported the conviction and sentence. He submitted that the charge was read and explained to the Appellant in a language that he understood, Kiswahili, and that he freely pleaded to the same. Facts were given by the prosecution which fully disclosed the offence charged; and

that the age of the complainant was medically proved.

5. Learned counsel further submitted that had the Appellant been hopelessly drunk as he has belatedly alleged, the trial court would no doubt have noticed his condition and differed the plea until he had sobered up.

6. As for sentence, learned counsel submitted that life imprisonment was mandatory for the offence that the Appellant stood convicted of.

7. I have considered the submissions of the Appellant (who was unrepresented) and those of the learned Prosecution Counsel. I have also examined the record of the trial court in order to satisfy myself that the plea was properly taken and unequivocal.

8. It is to be noted that there is no requirement of the law that the consequences of a plea of guilty be explained to an accused person before his or her plea is taken. All the court needs to do is to satisfy itself that the accused fully understands the charge by ensuring that the same is read and explained to him in a language that he understands. See the procedure for taking plea set out in **section 207** of the ***Criminal Procedure Code***. See also the case of **Adan –vs- Republic [1973] EA 445.**

9. The record of the trial court discloses that the charge was read and explained to the Appellant in Kiswahili, a language that he clearly understood as it was in the same language that he presented his appeal before this court. He made his allegation that he was hopelessly drunk when the plea was taken only at the time of hearing his appeal. No such complaint appears in his original petition and grounds of appeal, or in his supplementary grounds of appeal. The complaint is clearly an afterthought.

10. I am satisfied that when the plea was taken the Appellant was in full command of all his faculties, and that he clearly understood the charge. It is to be noted also that his plea was taken twice, originally on 03/02/2014 (when the prosecutor did not have all his facts ready) and on the following day, 04/02/2014. On both occasions the Appellant admitted the charge.

11. The facts as narrated by the prosecution, which facts fully disclosed the offence, were admitted by the Appellant. Medical evidence produced (**Medical Examination Report – P3**) showed injury around the complainant's anal canal, complete with numerous pus cells, indicating that there was penetration of her anus.

12. The Appellant argued in his written submissions that he should have been charged with an ***unnatural offence*** under **section 162** of the ***Penal Code*** and not under section 8(1) & (2) of the Sexual Offences Act. The Sexual Offences Act is a later statute with specific offences designed for the protection of children. The offence under section 8(2) of the Sexual Offences Act is particularly designed for the protection of very young children against sexual exploitation and harm. It is also to be noted that the definition of ***genital organs*** under section 2 of the Act -

> ***"includes the whole or part of male or female genital organs, and for purposes of this Act includes the anus".***

The Appellant was thus properly charged under the Sexual Offences Act.

13. The age of the complainant was fully proved by her birth certificate **No 518566** presented to court along with the other facts of the case. It showed that the child was born on 21/05/2006. As the offence was committed on 29/01/2014, the child was 8 years and nearly 4 months at the time of the offence, well within the offence in section 8(2) of the Sexual Offences Act.

14. The Appellant has also complained that his right to a fair trial under **Article 25(c)** of the ***Constitution of Kenya, 2010*** was violated, in that he was arrested on 01/02/2014 and arraigned before court on 03/02/2014 (as disclosed by the charge sheet). It is also to be noted that under **Article 49(1) (f)** of the Constitution an arrested person has the right to be brought before a court of law as soon as reasonably

practicable, but not later than 24 hours after being arrested. If the 24 hours end outside ordinary court hours, or on a day that is not an ordinary court day, then he should be brought to court not later than the end of the next court day.

15. I have checked the calendar for the year 2014. 01/02/2014 when the Appellant was arrested was a Saturday (not a court day). The following day (Sunday) was also not a court day. The Appellant was brought to court on 03/02/2014 (following Monday), the next court day. He was therefore brought to court as soon as reasonably possible. There is no substance in his constitutional complaint.

17. I am satisfied that he Appellant's plea as taken was clear and unequivocal. He fully understood the charge and freely pleaded to it. The facts as given by the prosecution (including the medical report on the complainant and her birth certificate) fully disclosed the offence charged.

18. As for the sentence, life imprisonment was mandatory under the law for the offence the Appellant stood convicted of under section 8(2) of the Sexual Offences Act, and the trial court had no discretion to impose a lesser sentence.

19. I find no merit in the appeal in its entirety. It is hereby dismissed.

DATED AND SIGNED AT MURANG'A THIS 3RD DAY OF MARCH 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 4TH DAY OF MARCH 2016