REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 51 OF 2014

JAMES OMBATI ODIEKI .... APPELLANT VERSUS

REPUBLIC .... RESPONDENT

(Appeal from the Sentence of the Chief Magistrate's Court at Nakuru, Hon. F. Muguongo – Resident Magistrate delivered on the 14th February, 2014 in A.CR Case No. 16 of 2014)

JUDGMENT

The Appellant **JAMES OMBATI ONDIEKI** has filed this appeal against his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts.

The appellant was arraigned in court on 16/1/2014 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(4) OF THE SEXUAL OFFENCES ACT, 2016**. The particulars of the charged were that

> ***"On the 13th day of January 2014 at** [particulars withheld **in Rongai District of the Nakuru County, unlawfully and intentionally committed on act by inserting a male organ namely penis into a female organ namely vagina a L N a child aged 15 years which caused penetration".***

The appellant faced an alternative charge of **COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006**. The appellant initially pleaded **'Not Guilty'** to both charges. His trial commenced on 30/1/2014.

The complainant **L N** who testified as **PW1** told the court that at the material time she was 15 years old and had just completed class 8 at *[particulars withheld* Primary School in Nyamira County. On 31/12/2013 whilst at home one **'Edwin'** whom the complainant knew came to her and told her aunt that someone wanted to talk to her. The said **'Edwin'** made a call and gave **PW1** the phone. The man on the line identified himself as **'James'** and told **PW1** that he lived in Nakuru and worked for a security company. The complainant on her part informed this **'James'** that she had just completed class 8. James promised to send for her to visit him in Nakuru.

Later on 13/1/2014 the **'Edwin'** met **PW1** and told her that James had sent money to enable him take her to Nakuru. **PW1** left with Edwin and they travelled to Nakuru.

Upon arrival Edwin called James (appellant herein) who came on a motorbike. They all went to the house of the appellant in *[particulars withheld*. They took soda and then Edwin left. The appellant and **PW1** remained in the house alone. After taking supper they retired to sleep. **PW1** told the court that there was

only one bed in the house and they both slept on it.

During the night the appellant told **PW1** to remove her clothes. He also removed his trouser. They engaged in sexual intercourse twice. The next morning the appellant prepared breakfast which they took. After a while a knock was heard on the door. Police barged in and arrested the appellant. They were all taken to Menengai Police Station. The complainant was taken to hospital for a medical examination. The appellant was eventually charged with the Offence of Defilement.

After the complainant concluded her evidence –in–chief the appellant indicated to the court that he wished to change his plea. He entered a plea of **'Guilty'** to the main charge of Defilement. The learned trial magistrate convicted the appellant on his own plea of Guilty and thereafter sentenced him to serve twenty (20) years imprisonment. Being aggrieved the appellant filed this appeal.

I have perused the written submissions filed by the Appellant. He raises three main grounds for his appeal

(i) Defective charge sheet

(ii) Failure to consider his mitigation

(iii) Excessive sentence

MR. CHIRCHIR learned State Counsel opposed the appeal.

This matter was not fully heard by the Subordinate Court. As stated earlier only the complainant gave her evidence in chief. After that the appellant opted to change his plea to one of Guilty to the main charge of defilement.

The first ground of appeal raised by the appellant is that the charge sheet was defective. He cites the fact that the original charge sheet cited Section 8(1) as read with Section 8(4) of the Sexual Offences Act. Section 8(4) of the Sexual Offences Act refers to the penalty for an Act of Defilement with a child aged between 16-18 years. In this case the complainant was stated to be aged 15 years. As such the correct provision should have been Section 8(3) which reads

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term or not less than twenty years"***

The incorrect citation was however noted by the learned trial magistrate. She stated at page 9 line 23

> ***"The court notes that there was an error in the charge sheet. The offence charged ought to be under Section 8(1) as read with Section 8(3) of the Sexual Offences Act ...."***

The trial magistrate went on to find that this was an error which was curable under Section 382 of the Criminal Procedure Code. I am in agreement with this finding. The erroneous citation of Section 8(4) instead of Section 8(3) was not in my view a material error and was not fatal to the prosecution case. This error only affected the penalty clause but did not materially alter the substance of the charge being defilement. It was clear to the appellant what offence he was being charged with and the particulars of the charge correctly gave the age of the complainant as 15 years. I do agree with the trial magistrate that this error did not occasion a failure of justice and was curable under Section 382 of the Criminal Procedure Code. I therefore find that this ground of appeal has no merit and the same is hereby dismissed.

I will now move on to consider whether the plea of Guilty entered by the appellant was unequivocal. The law on plea taking is set out in Section 207 of the Criminal Procedure Code Cap 75, Laws of Kenya which provides that

> ***"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 guilty, not guilty, or guilty subject to a plea agreement.***

(2) If the accused admits to the truth of the charge otherwise than by plea agreement, his admission shall be recorded as nearby 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 herein after provided......."

The legal principles to be followed in plea taking were further enunciated in the case of **ADAN Vs REPUBLIC (1973) E. A 445**, wherein the court held as follows

"(i) The charge and all the essential ingredients of the offence should be explained to the accused in the 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 questions of his guilt his reply must be recorded and the charge 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"

At first glance it would appear that the appellant's plea of Guilty was unequivocal. However a closer look persuades me that the appellant may not have fully comprehended the consequences of his plea. It is important to interrogate the Nature of Caution administered to the appellant before his plea is recorded.

In this case when the appellant initially pleaded **'Not Guilty'** to the charge the matter was set down for hearing. The trial commenced on 30/1/2014. After the complainant had testified the appellant said

"I want the court to kufungwa kifungo cha nje so that I can be going to work at night..... nimekubali case"

It would seem that the appellant pleaded guilty under the illusion that by doing so he would merit a non-custodial sentence. The record indicates at Page 7 line 13 that the trial magistrate explained to the appellant the effect of admitting the charge and the consequences thereof. All the appellant is recorded to have said in response is ***'Nimekubali'***.

A conviction on a charge of Defilement is a very serious matter. Not only does it merit a mandatory custodial sentence but it also leads to some kind of social stigma which may lead the convict to suffer ostracisation both within and outside prison. It is not a matter to be taken lightly. The learned trial magistrate ought to have put on record very clearly and word by word the nature of the caution she gave the appellant and also recorded his response to indicate that he fully understood the consequences of his guilty plea. The caution should have been along the following lines

"I caution you that in pleading guilty you are accepting that you defiled a child under the age of 18 years. I further caution you that if you are convicted on your own plea of guilty then this court will sentence you to a term of imprisonment with no option of a fine or other non-custodial sentence......"

Once such a caution is administered in clear and uncertain terms the magistrate must enquire from the

accused whether he had understood the caution. His response in his own words must be recorded. Only then should the trial court proceed to record a guilty plea again using the exact words uttered by the accused.

This was not done in this case leading me to doubt whether the appellant fully understood the consequences of his guilty plea. I note that when asked to mitigate the appellant renewed his plea for a non-custodial sentence saying

> ***"I ask court to give me non-custodial sentence so I can continue working......."***

It is evident that it had not fully been understood by the appellant that his guilty plea would lead to a mandatory custodial sentence.

For the above reasons I find that the appellants plea cannot be said to have been unequivocal. He clearly did not comprehend the consequences of his action in pleading guilty. I therefore set aside his conviction and quash the 20 year term of imprisonment imposed upon the appellant.

Given that the victim in this case was a minor a vulnerable member of society and given that no full trial of the matter was conducted, I find that justice is best served by ordering a retrial in this matter. I direct that the appellant be taken before the Chief Magistrate Nakuru for a fresh plea to be taken and a retrial of this matter to be conducted. It is so ordered.

Dated in Nakuru this 11th day of November, 2016.

Court – Mention on 21/11/2016 for plea to be taken. Appellant to remain in remand until that time.

Maureen A. Odero

Judge

11/11/2016