



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 19 OF 2011

SIMON KIPNGENO KIRUIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and Sentence by the

Honourable S. Rotich, Principal Magistrate at Sotik in

Criminal Case No. 302 of 2011 on 28.4.2011)

J U D G M E N T

1. **SIMON KIPNG'ENO KIRUI** (*the appellant*) was first arraigned in Kericho Court on **27th April, 2011** for plea, having been charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. He also faced an alternative count of indecent acts with a child contrary to **Section 11(1)** of the **Sexual offences Act No. 3 of 2006**.

2. The charge was read to him but he could not plead as the court lacked jurisdiction to deal with the matter which was then sent to Sotik Law Courts.

3. On **28th April, 2011**, the appellant was arraigned before the Principal Magistrate Sotik Court for plea.

Both the original and typed record show that no charge was read to the appellant but he responded saying;

" It is true. We talked and agreed"

4. It is therefore not clear from the record what he was saying was true and what they talked and agreed.

Secondly, though the record shows there was a clerk in court its not indicated what was the language of interpretation.

5. The record shows that facts were read out to the appellant who admitted them as being correct.

6. He was convicted and sentenced to twenty (20) years imprisonment.

Being dissatisfied he filed this appeal against both conviction and sentence, raising the following grounds:

- a. ***That the learned magistrate erred in law and in fact in failing to read and explain to the appellant the charge and all ingredients in the appellant's language or in language he understands.***
- b. ***That the learned magistrate erred in law and in fact in that he failed to ascertain that the facts were well stated to the appellant and the appellant given an opportunity to dispute, explain or add any relevant facts. If the appellant did agree to the facts, he would have raised any questions for his guilt and his reply ought to have been recorded.***
- c. ***That he appellant did not have benefit of legal counsel.***
- d. ***That the learned magistrate erred in law and in fact by failing to satisfy that the plea was totally unequivocal and that the appellant understood elements of the offence and its penalty.***
- e. ***That the learned magistrate erred in that he imposed a sentence which is manifestly excessive considering the circumstances of this case.***

7. When the appeal came for hearing **Mr. Motanya** for the appellant submitted as follows:

- (i) ***No plea was taken.***
- (ii) ***If any plea was taken it was not unequivocal.***
- (iii) ***There was no evidence to support the charge.***
- (iv) ***The appellant was never taken for medical examination***

8. **Mr. Mutai** for the State conceded the appeal on the following grounds;

- (i) ***From the record it was not clear whether a proper plea was taken or not.***
- (ii) ***It was therefore a mistrial.***
- (iii) ***The facts do not indicate the age of the complainant yet this is a vital ingredient.***

9. He further submitted that the State would not be asking for a retrial as it was not sure of the availability of witnesses.

10. Whatever transpired in this matter in the court below is as explained in paragraphs 2-6 of this judgment. We are a court of record and if indeed the charge was read and explained to the appellant there was nothing that stopped the learned trial magistrate from indicating so in the record.

11. The facts given are also so shallow. The age of the complainant is not indicated and neither was there any evidence of such an age.

The findings by the examining doctor were never read to the appellant for him to admit or deny them.

12. Indeed this was a mis-trial. The appellant has been in Prison for almost four(4) years now. The State has confirmed that getting witnesses will be an uphill task. It would therefore be fruitless to order for a retrial as the same would be an injustice to the appellant. See

(i) ***Muiruri V R [2003] KLR 552***

(ii) ***Nyakundi & Anor V R [2003] KLR 704***

13. The result is that the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant shall be released unless otherwise lawfully held under a separate warrant.

Dated, signed and delivered this 12th day of March, 2015

H.I. ONG'UDI

JUDGE

In the presence of :

Miss. Kivali for State

Mr. Motanya for appellant

Appellant – Present in person

Langat- Court Assistant

Interpretation- English/Kipsigis