REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 146 OF 2013

CHARLES NGESA NGAU..... APPELLANT

V E R S U S

REPUBLIC..... STATE

(From original and conviction of sentence P.M's at Mwingi Cr. Case No. 344 of 2012).

J U D G M E N T

The appellant was charged in the subordinate court with two main counts of defilement contrary to Section 8(1) of the Sexual Offences Act. The particulars of count one were that between 31st May 2012 and 5th June 2012 at [particulars withheld] location in Migwani District of Kitui County intentionally did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of NM a child aged 17 years. The particulars of count two were that on diverse days between 31st May and 5th June 2012 at the same place intentionally did an act which caused penetration of his genital organ namely penis into the female genital organ namely vagina of KN a child aged 16 years.

In the alternative he was charged with committing indecent act on a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the alternative charge to count one were that on diverse days between 31st May 2012 and 5th June 2012 at [particulars withheld] Location in Migwani District of Kitui County intentionally did an act which caused the contact of his male genital organ namely penis with a female genital organ namely vagina of NM a child aged 17 years. The particulars of the alternative to count two were that on diverse days between 31st May 2012 and 5th June 2012 at [particulars withheld] Location in Migwani District of Kitui County intentionally did an act which caused the contact of his male genital organ namely penis with the female genital organ namely vagina of KN a child aged 16 years.

The appellant was recorded as having pleaded guilty to count one. He was thus convicted and sentenced. He however pleaded not guilty to count 2 and the alternative charge to the said count two. He was tried and was acquitted of the offence.

The appellant has now come to this court on appeal regarding count one on which he was recorded as having pleaded guilty and was convicted and sentenced. He filed his appeal through his counsel C. K. Nzili and Company. The grounds of appeal are as follows:-

1. The learned trial magistrate erred in law and in facts in finding that the appellant is guilty on a plea of guilty without satisfying himself that the accused had understood the charges and the facts.
2. The learned trial magistrate erred in law and in facts in convicting on a plea which was not an equivocal.

3. The learned trial magistrate erred in law and in facts by failing to accord the accused the services of an interpreter in a language he understood.
4. The learned trial magistrate erred in law and in facts by giving an excessive sentence without considering the accused mitigation and the circumstances of the case.
5. The learned trial magistrate erred in law by failing to give sufficient consideration to the age of the complainant.

The counsel for the appellant also filed written submissions. He relied on the case of ***Adan -vs- Republic (1973) EA 445*** with regard to the taking of a plea of guilty. Counsel also relied on the case of ***Falehali Manji -vs- Republic (1964) EA 481*** on the circumstances in which a court could order a retrial.

During the hearing of the appeal Mr. Nzili for the appellant relied on the submissions filed. He submitted also that though the record of the court showed that the language used was Kiswahili and Kikamba it was not clearly indicated that he understood the language or that the charges and facts were explained in those languages. Counsel also submitted that nothing was said about the alternative charge to count one. Counsel submitted further that the age of the complainant was such that there was a doubt on whether indeed she was below 18 years. The age was said to be 17 years and some months and section 8 of the sexual offences act provided for a defence where an accused was misled into believing that the complainant was an adult.

The learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the plea of guilty was unequivocal. The facts were read and confirmed by the appellant. Counsel submitted that the age of the complainant was 17 years and 11 months and added that the complainant was actually below 18 years and as such the offence was committed. Counsel also submitted that there would be no need of calling witnesses as the appellant had already pleaded guilty to the offence. In counsels view the language used in court was understood by the appellant. Counsel added that the learned magistrate was not bound by law to inform the appellant about the severity of the sentence.

This is a first appeal. The appeal arises from a conviction where the appellant was convicted on a plea of guilty.

I have perused the entire record. I have also considered the submissions of the appellants counsel and the state. In my view the language used in court was understood by the appellant. It was Kiswahili translated into Kikamba. The appellant did not say at the trial nor in this court that he does not understood any of those languages. In my view therefore the appellant understood the language in which the charge was read to him and the language used in the entire proceedings.

Counsel for the appellant has submitted that it was not clear as to what happened to the alternative charge. An alternative charge is merely an alternative. It can only come in to play when the main charge is not proved. Once a conviction has been entered on the main charge, the alternative charge ceases to have any position in the proceedings. The fact therefore that the learned magistrate made no findings on the alternative charge did not affect the conviction on the main count. I dismiss that ground.

In my view the magistrate did comply generally with the procedure for taking a plea of guilty as laid down in the case of ***Adan -vs- Repulic (supra)*** relied upon by counsel for the appellant. What gives me some doubt about the conviction on a plea of guilty is the age of the complainant who was said to be 17 years and 11 moths at the time of commission of the offence. Technically an offence would have been committed. However there is a defence provided under Section 8 of the Sexual Offences Act where an accused believes that the complainant is an adult. In my view, in summarizing the facts, the prosecutor should have said whether or not the appellant knew that the complainant was below 18. That would have cleared doubt about the defence that is provided by law. Once the prosecutor did not say so in the summary of facts, it could not be said that the plea was unequivocal. It could go either way. It leaves a room for doubt. And in criminal cases, where there is a doubt, the benefit of that doubt has to be given to an accused person. I give the benefit of the doubt to the accused herein.

In quashing the conviction against the appellant, I will not order a retrial. The appellant has been in

custody since June 2012. In my view that is adequate punishment for him and ordering a retrial would be creating an injustice. In addition the state has not asked for a retrial.

Consequently and for the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant is set at liberty

forthwith unless otherwise lawful held.

Dated and signed at Garissa this 2nd July 2015.

GEORGE DULU

JUDGE