



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.49 OF 2014

(Being an appeal from the original conviction and sentence in Criminal Case No.914 of 2014 of the Principal Magistrate’s Court at Ogembo by Hon. N. Wairimu – (Ag.PM))

GEORGE MOSE SOIGWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein GEORGE MOSE SOIGWA was charged with the offence of **Defilement contrary to Section 8(1)** as read with **Section 8(3) of the Sexual Offences Act No.3 of 2006**.

The particulars of the charge were that on 2nd June 2014 at [particulars withheld] sub-location in Gucha District within Kisii County, intentionally caused his penis to penetrate the vagina of C O K a child aged 15 years and 11 months.

2. The appellant also faced the alternative charge of committing an **Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006**.

The particulars of the alternative charge were that on 2nd June 2014 at [particulars withheld] sub-location in Gucha District with Kisii County, intentionally touched the vagina of C O K with his penis against her will.

3. On 5th June 2014, the Appellant appeared before the magistrate’s court where he pleaded guilty to the main charge of defilement contrary to **Section 8 (1)** as read with **Section 8(3) of the Sexual offences Act No.3 of 2006**, and the magistrate proceeded to convict him and sentenced him to serve 20 years imprisonment.

4. The appellant has in this matter appealed against both conviction and sentence and has in his petition of appeal listed 4 grounds of appeal as follows:

1. **That I pleaded guilty for (sic) the conviction imposed because I was confused for I was beaten by the people of the public.**
2. **That the magistrate did not allow me back to retrial so that I can attend the witnesses of the victim.**
3. **That, the term imposed to me (sic) was harsh, the trial magistrate did not grant me fair**

sentence which will allow me to assist the family members who are suffering of insecurity and food since was the breadwinner.

- 4. That I be provided with High Court and Lower Court proceedings to assist me adduce grounds during court of appeal submissions.**
5. The Appellant relied on his “*homemade*” written submission during the hearing of his appeal in which he stated that the trial magistrate did not warn him of the consequences of pleading guilty to the charge of defilement and that he was unduly coerced by the police who tortured him and threatened him with dire consequences if he did not plead guilty to the charge of defilement.
6. The Appellant pleaded for a retrial stating that his constitutional right to fair trial was violated by the police who forced him to plead guilty. Mr. Majale, counsel for the State opposed the appeal and submitted that the Appellant’s plea of guilty was unequivocal and the sentence passed lawful.
7. This being a first appeal, this court is obligated to re-evaluate and analyze the evidence on record and draw its own conclusion while bearing in mind the fact that it neither heard nor saw the witnesses testify (see *Okeno vs R.*)
8. In the instant case, no witnesses were called to testify as the Appellant pleaded guilty to the charge of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No.3 of 2006**. The prosecution however tendered documentary evidence in support of the charge.
9. The court is however, still bound to evaluate the circumstances under which the said plea was taken in order to determine if the same was unequivocal.
10. The record of the magistrate shows that the charges were read to the Appellant in Ekegusii, interpreted in Kiswahili by Moseki whose designation is shown as “*c/c*” which I take to mean “**Court clerk**”.
11. The Appellant is recorded to have responded to the charge as follows: “**Ni ukweli.**” The record shows that upon responding to the charge, the magistrate asked the accused if he was aware of the sentence he is likely to face if convicted of the offence herein to which the accused responded in the negative. The magistrate then informed the accused of the provisions of **Section 8 (3) of the Sexual Offences Act** to which the accused responded:

“I understand, the complainant is my customer, she brings me milk and we had agreed. It is not the first time. I do not wish to change my plea.”

It was after the above statement/response by the accused that the court proceeded to enter a plea of guilty against him. The magistrate accepted that statement by the appellant as an admission by the Appellant of the charge read out to him.

12. The court prosecutor, then proceeded to narrate to the trial court the facts on which the Republic was relying to prove the charge against the Appellant. Those facts were that:-

“C O K was hawking Milk at Omoringamu market where she was sent by her grandmother T O in the process of delivering the milk the complainant was called by the accused who led her to his house purporting to buy milk. When the complainant was about to leave the accused grabbed her and took her to have unprotected sex with him.

Afterwards, the accused locked the house with a padlock and went away. The accused came back again at 10.00 p.m., and had sex with the minor the whole night. The next day the complainant escaped after the accused left her in the house forgetting to lock the door. The complainant was covering herself with a bed sheet because he accused

had taken her clothes. On her way the complainant met 3 women who knew the accused by name. The complainant told the women what had transpired. The women and the complainant were outside the accused's compound when the accused came back and when asked to return the complainant clothes, the accused gave them out.

The complainant was taken to the chief's office and they were referred to the police. The complainant was treated at Gucha Level 4 hospital and the matter was reported to Ogembo Police Station. P3 form PRC forms were filled and the accused was arrested the same day. I wish to produce:

- a. P3 form - Exh.1
- b. PC form - Exh.2
- c. Birth Certificate - Exh.3
- d. Treatment notes - Exh.4

13.The appellant is recorded to have responded to the facts as follows:

“I understand the facts. They are true.”

14.Upon admitting the facts, the magistrate convicted the Appellant and in mitigation before sentence, the Appellant is recorded as telling the magistrate as follows:

“I ask court to forgive me so that we can go and deliberate on the matter at home. I don't have parents, I have younger siblings who depend on me. I would like to go back home and deliberate on the matter with the complainant.”

15.The magistrate then proceeded to sentence the Appellant to serve 20 years imprisonment. Before sentencing the Appellant, the magistrate observed as follows:

“.....considering the demeanor of the accused person who appears not to see the wrong in having sex with a minor, and upon consideration of the fact that the accused even after being informed of the sentence he is likely to face in case he is convicted and having decided that he will not change his plea, I would sentence the accused to 20 years imprisonment.”

16.From the record of the lower court, I am fully satisfied that the Appellant's plea of guilty was clear and unequivocal as the magistrate duly warned him of the risk he faced and the likely sentence that would be meted upon him if he persisted on his plea of guilty, but the Appellant still confirmed his plea, that the Appellant's plea of guilty was unequivocal is further confirmed by the Appellant's own admission, after being warned by the magistrate of the import of his guilty plea, when he said... **“We had agreed. It was not the first time.”** In effect, the Appellant confirmed to the trial court that it was not the first time that he was having sex with or defiling the minor. His mitigation did negate the offence.

17.On the Appellant's ground of appeal that he was pressured, tortured or coerced by the police to plead guilty, I find that there is nothing on the record of the magistrate which would suggest that the Appellant was under any pressure from anyone to plead guilty to the charge.

18.It is very clear, from the record, that the trial magistrate was very cautious and went to great lengths to explain to the Appellant the nature of the charges he was facing and the likely consequences of a plea of guilty. The magistrate made sure that the Appellant understood the proceedings. I am satisfied that the Appellant voluntarily pleaded guilty to the charges and the only thing he wanted was to be given a chance to sort out the matter at home with the minor/complainant.

19.I have no doubt that the Appellant perfectly understood the proceedings before the magistrate's

court. He has in this appeal not complained that he did not understand the Ekegusii/Kiswahili interpretation language that was used by the court. On the ground that the Appellant was not accorded a fair hearing. I hold and find that by his own plea of guilty, the Appellant waived his right to a trial. The Court of Appeal in **C.A.Nyeri Criminal Appeal No.123 of 2014** held as follows:

“A plea of guilty is a serious matter. It signifies a no contest and a total capitulation on the part of an accused person. In so pleading, he waives his right to trial, one of the most fundamental aspects of the criminal justice process. He waives numerous elements of a fair trial including most significantly the presumption of innocence and the right to confront and challenge his accusers and the evidence presented against him in discharge of the prosecution’s burden of proof.”

20.The Appellant has also contested the sentence passed on him by terming it harsh. **Section 8 (1) of the Sexual Offences Act** provides as follows:-

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

Section 8 (4) provides that:-

“a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term not less than fifteen years.”

21.The victim of the Appellant’s sexual molestation was said to be 15 years 11 months, just 1 month shy of sixteen years. The P.3 form shows that the victim was 16 years old. I therefore find that the sentence to a prison term of 20 years was lawful under the circumstances.

22.In the end, the Appellant’s appeal is hereby dismissed.

23.It is so ordered.

Dated, signed and delivered in open court this 4th day of November, 2015

HON. W. OKWANY

JUDGE

In the presence of:

- Muhindi for the State
- Appellant in person
- Ogega: court clerk