REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.64 OF 2013

GEOFREY MWENDA…….....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant **Geoffrey Mwenda** was charged with the offence of defilement of a girl contrary to **Section 8 (1) (3) of the Sexual Offences Act No.3 of 2006.**

The particulars of the offence were that on diverse dates between 1st January 2012 and 23rd July 2013 at Kivimampiu location in Igembe South District within Meru County intentionally caused his penis to penetrate the vagina of a girl aged 13 years. The Appellant was convicted on his own plea of guilty and sentenced to 20 years imprisonment. The appellant was aggrieved by the conviction and sentence thus provoking the instant appeal on 4th November 2013.

The appellant through his advocate Miss Nelima, filed supplementary grounds of appeal on 29th October 2014 setting out the following grounds;

1. THAT the learned magistrate erred in law in convicting the appellant on a plea that was not unequivocal;

2. THAT the learned magistrate erred in law and fact in failing to follow the laid down procedures in taking plea as set out in section 207 of the Criminal Procedure Code CAP 75 of the Laws of Kenya;

3. THAT the learned magistrate erred in law and fact in convicting the appellant when the particulars in the charge were at variance with the facts stated;

4. THAT the learned magistrate erred in law and fact in convicting the appellant without seeing the minor in question or confirming her age;

5. THAT the learned magistrate erred in law and fact in failing to caution the appellant before accepting the plea given that the charge facing the accused was of a serious nature and carried a harsh sentence.

When the appeal came up for hearing on 29th October 2015, Ms Nelima, Counsel for the appellant submitted inter alia that the plea was not unequivocal in that the appellant admitted the offence and went ahead to give an explanation. She submitted that at that stage the court should not have entered a plea of guilty. For this proposition counsel relied on the case of ***Adan v Republic Criminal Appeal No. 58 of 1973.*** She further contended that before convicting the appellant, the court should have seen the complainant to ascertain if indeed she was 13 years; that the P3 form was not produced and that the contents of the P3 form should have been incorporated in the facts. She therefore urged the court to order a retrial.

Mr. Mulochi, Learned Counsel for the State, in opposing the appeal submitted that the appellant was convicted on his own plea of guilty and as such he could only appeal on sentence. With regard to the sentence, he submitted that the appellant was handed the minimum sentence which was lawful and consequently urged the court to dismiss the appeal.

I have considered the submissions by both Counsel and the grounds of appeal. The appellant having been convicted on his own plea of guilty, the primary consideration in this appeal is whether the said plea was unequivocal. The Black's Law Dictionary 7th Edition by Garner defines the word ***unequivocal*** as follows:

"***Unambiguous, clear, free from certainty"***

A perusal of the record of the proceedings in the trial court shows that when the substance of the charge and every element thereof was read to the appellant in Kimeru language, he responded as follows:

> "***It is true I defiled the complainant who is aged 13 years but she was my wife. I married her on 25/5/13 with the consent of her parents she is now 3 months pregnant.***
>
> ***Court: Plea of guilty entered."***

The facts were then read out to the appellant as follows:

> "***the facts are that on 21/7/13 at about 4.00PM the complainant in this case CK who is a child aged 13 years disappeared and went to the accused's home. She stayed there until 23/7/13 at about 7:00pm when one Charles Michubu saw her. Since it was not the first time to see her at accused's house he suspected that the accused person had been using the child as his wife. He reported the matter to the area chief. In Mr. Michubi's view the girl who is at tender years was supposed to be in school. The area Chief Mr. Jonathan Kirimi went to the accused's house. He met her with the girl. He arrested them and escorted them to Maua police station.***
>
> ***The accused person was locked up in the cells while CK (girl) was taken to Nyambene district hospital where it was confirmed she was pregnant. It was established by the investigating officer that the accused person had talked with the girl's parents over marrying the girl but the parents refused.***
>
> ***I have the medical notes from Nyambene District Hospital, lab request form dated 24/7/13 and a P3 form for the young girl and I wish to produce the exhibit 1, 2 and 3 respectively.***
>
> ***After considering the statements from all relevant witnesses and gathering all the exhibits the accused person was charged with this offence.***

The appellant in reply to the facts stated as follows:

> "***the facts are correct. She was my wife and I do not deny it.***
>
> ***Court: accused person is convicted on his plea of guilty."***

The legal principles to be applied in plea taking in all criminal cases were well enunciated in the *locus classicus* case *of* ***Adan vs Republic [1973] EA 445*** where the Court held:-

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

The offence with which the appellant was charged is a very serious one and the appellant should have been warned of the consequences of pleading guilty to such a charge once he showed interest in pleading guilty. Upon conviction, a charge of defilement under Section 8 (1) (3) of the Sexual Offences Act attracts a sentence of not less than twenty years imprisonment. The appellant should have been warned of the consequences of pleading to such a charge which was not done by the trial court. The appellant was unrepresented and it was the duty of the court to inform the appellant his rights. The appellant may not have appreciated the seriousness of the offence he was facing.

When the charge was read to the appellant, the appellant alleged that the complainant was his wife although she was said to be only 13 years of age. In an offence of defilement, the prosecution does not need to prove consent. All the prosecution has to prove is that the complainant is a minor and that there was penetration. However, under **Section 8 (5) of the Act**, an accused can set up a defence. The section reads:

> ***"8 (5) It is a defence to a charge under this Section if –***
>
> ***(a) It is proved that such child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) The accused reasonably believed that the child was over the age of eighteen* years."**

Having stated that the complainant was his wife, the appellant was raising a defence that may have fallen under the above section and it would have been proper if a plea of not guilty was entered. Bearing in mind the possibility of the above defence available to the appellant under Section 8 (5), the trial court should have asked the prosecution to avail the complainant in court for the court to make its own judgment as to whether the complainant is a person who could have been confused for an eighteen year old or not or if she was a person that was capable of getting married.

Further to the above, under Section 8 (1) (3) of the Sexual Offences Act, the age of a complainant must be established in order to determine the kind of sentence that should be meted in the event of a conviction. Such evidence should have been produced when facts were read by the prosecutor, by availing the complainant's birth certificate, clinic card or age assessment by an expert. None of the above was done. The age of the complainant was not proved and there was no basis for the sentence meted by the court. Since the age of the complainant was not proved, a primary ingredient of the charge under Section 8 (1) (3) of the Sexual Offences Act was missing and therefore the facts did not fully disclose an offence of defilement under the said Act.

Even after the facts were read to the appellant, the appellant still repeated the allegation that he was

married to the complainant. Right from the onset, the plea was not unequivocal and the court should have entered a plea of not guilty. For the above reasons, the conviction is unsafe. It is hereby quashed and the sentence of 20 years is hereby set aside.

The appellant prayed that the case be remitted back to the trial court for a full trial. Can this court order a retrial? In the case of ***Meralli & Others v Rep (1971) EA 221***, the then EA Court of Appeal said as follows:

> ***"It is well settled that an order for a retrial is not justified unless the original trial was defective or illegal. A retrial may also be ordered if the interests of justice so require without causing prejudice to the accused ....***
>
> ***.... Each case has to depend on its own facts and circumstances."***

In an earlier case of ***Ahmed Ali Aharamshi Sunar v Rep (1966) EA 343***, where the court held;

> ***"(i) Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it and where it is not likely to cause an injustice to an accused person.***
>
> ***(ii) There was ample evidence on which to convict the appellant if the prosecution witnesses were believed, but the magistrate failed to test the evidence ....."***

In ***Fetahali Manji v Rep (1966) EA 343*** the court further held that a retrial will not be ordered for purposes of filling up gaps in the prosecution case.

In the instant case, the appellant was convicted and sentenced to 20 years on 25/7/2013 just over 2 years ago and there has not been inordinate delay in hearing this appeal. He has not served most of the sentence; the offence the appellant faced was a very serious one carrying a minimum sentence of 20 years imprisonment; further the potentially admissible evidence that may be adduced by the prosecution is likely to result in a conviction. I find that the appellant will not be prejudiced in any way if a retrial is ordered. The result is that I direct that this matter be and is hereby remitted back to CM's Court, Maua to be heard afresh before any other magistrate other than Mr. Maundu, SPM who took plea. This matter be mentioned before Maua CM's Court on 8/12/2015 for plea and further orders.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF DECEMBER, 2015.

R.P.V. WENDOH

JUDGE

3/12/2015

In the Presence of:

Mr. Mulochi for State

Miss Nelima for Appellant

Ibrahim/Peninah, Court Assistants

Present, Appellant