



No. 236/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 19 OF 2012

**KENNEDY MUTINDA MUTUA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court Criminal Case No. 4 of 2010 by Hon. A. W, Mwangi, SRM on 19/2/2010)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act, No. 3 of 2006, Laws of Kenya**. Particulars thereof being that on the **14<sup>th</sup>** day of **February, 2010** at [**Particulars Withheld**] in **Matungulu District** within the **Eastern Province**, intentionally unlawfully did an act which caused penetration with his organ (penis) into genital organ (vagina) of **F W W** a child aged **10 years**.
2. The appellant admitted the charge, was convicted and sentenced to **serve life** imprisonment. Being aggrieved by the conviction and sentence, he now appeals on the ground that he did not plead guilty to the charge.
3. Counsel for the appellant **Mr. Mutuku** submitted that there was a mistrial. He stated that when charges were read to the appellant at the first instance, he admitted the charge, then immediately the court realized that he had been produced in court outside the required time an explanation was given by the prosecution which was satisfactory. The court read the charge to the appellant. It was argued that the manner of reading the charge was not clear and in what language it was done. It was doubtful in what language the appellant replied to the charge. Further counsel argued that the facts presented were different from the particulars of the offence. He faulted the prosecution to have failed to state the appellant unlawfully did an act that caused penetration into the organ of the complainant, a material fact that the appellant should have pleaded to. What he pleaded to was a legal conclusion in his opinion. He prayed for a retrial.
4. **Mrs Abuga**, learned State Counsel opposed the appeal. She argued that the plea taken was an unequivocal plea of guilty. The language used was indicated as **Kikamba**. He admitted the offence and facts presented. The P3 form was produced which proved that the minor had been defiled. She argued that the sentence imposed was within the law and called upon the court to dismiss the appeal.
5. It is trite law that no appeal lies on a plea of guilty except as to the extent of legality of sentence. (see **Section 348 of the Criminal Procedure Code** ). There may be instances, however, where a court can interfere with a plea of guilty. In the case of **Laurent Mpinga versus Republic [1983] TLR 166**, the criteria for interfering with the plea of guilty was stated thus:-

- i. **That** even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in treating it as a plea of guilty.
- ii. **That** the appellant pleaded guilty as a result of a mistake or misapprehension.
- iii. **That** the charge laid at the appellant's door disclosed no offence known to law; and
- iv. **That** upon the admitted facts the appellant could not in law have been convicted of the offence charged.
- v. Further, in the case of ***Rex versus Forde [1923] 2KB 400*** His Lordship Avory, J had this to say at page 403;-

***“A plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears;***

- ***That the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or***
  - ***That upon the admitted facts could not in law have been convicted of the offence charged”.***
6. In this case the charge as drawn discloses an offence known in law. The particulars of the offence disclose ingredients for the offence of defilement of a child of the age stated. The charge and the particulars of the offence were read out to the appellant in Kikamba a language that he understood, the interpreter present communicated in English, Kiswahili and Kikamba. It can therefore not be said that it was not clear which language was used to communicate to the appellant.
  7. The charge on being read the appellant replied thus;-

***“ it is true I defiled her”***

Facts of the case were presented by the court prosecutor. The appellant accepted that the facts were correct. The original handwritten record shows that the court proceeded to convict the appellant following his plea of guilty. When given an opportunity to mitigate, he pleaded that he was **20 years** old, an employee of the complainant's mother and it was the first time he had sex with the complainant.

8. The facts presented disclosed the age of the complainant, the act of penetration was proved by medical evidence (P3) which indicated the child sustained a torn hymen. A high vaginal swab carried out revealed presence of pus cells, bacteria, some blood and the doctor formed an opinion that the child had been defiled.
9. This is a case where the court has been asked to declare the trial a mistrial. In the case of ***Salvatore versus State 366 S.O 2d 745*** which is persuasive it was held thus;

***“The discretion to declare a mistrial must be exercised with great care and only in cases of absolute necessity”***

10. This is a case where the appellant appreciated the nature of the offence he faced and as seen by the mitigating factor he proved that he indeed intended to admit having had sex with his employee's child. There was no misapprehension of whatever nature. He clearly expressed his guilt. Following the evaluation and re-consideration, of the record, I am satisfied that the appellant was rightly convicted on his own unequivocal plea of guilty.
11. The sentence meted out is the mandatory prescribed sentence of the offence. This court cannot interfere with it.
12. For reasons given, the appeal has no merit. It is dismissed

**DATED, SIGNED and DELIVERED at MACHAKOS this 3<sup>RD</sup> day of MARCH, 2014.**

**L.N. MUTENDE**

**JUDGE**