



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 41 OF 2013

CHRISTOPHER TUWEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence awarded by the Principal Magistrate at Kericho (J. Ndururi) in Kericho Principal Magistrate's Court Criminal Case No.60 of 2012)

JUDGMENT

On the 28th August 2013, **Christopher Tuwei**, the appellant was convicted on his own plea of guilty to the offence of defilement of a girl aged 14 years contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on diverse dates between the months of November 2011 and 13th March 2012, at [Particulars Withheld] of Kipkelion District within Kericho County, the Appellant is alleged to have unlawfully and intentionally caused penetration of his penis into the vagina of **VC**, a girl aged 14 years. The appellant was thereafter sentenced to 20 years imprisonment. The appellant was dissatisfied hence this appeal.

On appeal, the appellant put forward the following grounds in his supplementary petition of appeal:

1. **That the learned magistrate erred in law and in fact in failing to read and explain to the appellant the charge and all the ingredients in the appellant's language or in a language he understands.**
2. **That the learned magistrate erred in law and in fact in that he failed to give the accused and opportunity to state on record whether or not the accused person was agreeable to the amendment of the charge sheet.**
3. **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 to add any relevant facts. It the appellant did agree to the facts he would have raised any questions for his guilt and his reply ought to have been recorded.**
4. **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 the elements of the offence and its penalty.**
5. **That the learned magistrate erred in law and in fact in that he did not consider the fact that although the complainant's birth certificate was produced it did not state the actual age of the complainant and that the said age was not rebuttable.**
6. **That the learned magistrate erred in law and in fact in that he failed to give the appellant an opportunity to cross-examine the complainant on the issue of her age and raise questions on the birth certificate produced before the trial magistrate by the complainant.**
7. **That the appellant did not have benefit of the legal counsel.**

8. **That the judgment was bad in law and never considered the mitigating circumstances of the case.**
9. **That the Sentence awarded was harsh and excessive in all the circumstances of the case.**

When the appeal came up for hearing, Miss Muthee, learned state counsel conceded the same on the ground that the plea was equivocal. She urged this court to order for a re-trial. Mr. Motanya, learned advocate for the appellant was of the view that the appellant was not given a chance to interrogate the complainant about her age **vis-a-vis** the birth certificate that was produced before the trial court by way of cross-examination. It is also argued that the appellant was not given a chance to state whether or not he was in agreement with the application for amendment of the charge by the prosecution. The appellant was not averse to the proposal to this court to make an order for a retrial. A careful perusal of the original charge sheet which was later amended on the application of the prosecution shows that the amendment should not have been allowed without first seeking the views of the Appellant. With respect, I agree with the appellant that the trial magistrate erred when he proceeded to allow the prosecution's application to amend the charge sheet before giving him a chance to make submissions. It is possible the appellant pleaded guilty to an amended charge sheet which he had not taken time to understand. In the circumstances it cannot be said that the plea was unequivocal. I have intentionally avoided to consider the merits of the appeal because I am convinced this is a case which I should make an order for retrial. In the end I find the plea to be equivocal hence the conviction cannot be sustained. The conviction is quashed and the sentence is set aside. The appellant be taken before another magistrate of competent jurisdiction other than Honorable J. Ndururi for retrial.

Dated, Signed and delivered this 4th day of October 2013.

J.K.SERGON

JUDGE

In open court in the presence of

Miss. Muthee for the State

Mr. Motanya for the Appellant

Mr. Koech- court clerk