REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 1 OF 2013

ROBERT RONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made by the learned Senior Resident magistrate at Sotik court (Hon. J.Kasam) in Sotik Principal Magistrate's court criminal(S.O) case No.74 of 2012on 24/12/2012)

JUDGMENT

ROBERT RONO, the appellant herein, was convicted on his own plea of guilty to the offence of defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act**. The particulars of the offence are that on diverse dates between 6th and 12th December 2012 [particulars withheld] in Konoin District of the Rift Valley Province intentionally caused his penis to penetrate the vagina of **M C** a child aged 14 years. The appellant was sentenced to 50 years imprisonment. Being aggrieved, the appellant preferred this appeal. He put forward the following grounds of appeal:

1.That the learned magistrate erred in law and in fact in convicting the appellant on the basis of a charge sheet which is defective. The particulars of the offence alleged to have been committed does not disclose that the same was committed unlawfully.

2.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 understood.

3.That the learned magistrate erred in law and in fact in that she 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. If the appellant did agree to the facts he would have raised any questions for his guilty 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 fact in that she imposed a sentence which is manifestly excessive considering all the circumstances of the case.

When the appeal came up for hearing, Mr. Motanya learned Advocate for the appellant abandoned ground 1 in which the appellant was basically challenging the competency of the charge. It is Mr. Motanya's argument that the appellant did not understand the language used in court hence the plea was equivocal. In his second ground of appeal, it is his argument that had the learned Ag. Senior Resident

Magistrate explained to the accused the consequences of pleading guilty to such an offence the appellant would not have admitted the offence. Thirdly, Mr. Motanya urged this court to find that the appellant's trial was prejudiced by the failure by the prosecution to tender evidence showing the actual age of the complainant. The learned advocate was of the view that a different sentence would have been pronounced other than the one which is now said to be harsh and excessive.

Miss. Magoma, Learned Prosecution Counsel was of the view that the appeal lacks merit hence it should be dismissed. She argued that the facts outlined by the prosecution established the offence. It is admitted by the learned prosecution counsel that the language used was not recorded and also that there was no age assessment on the part of the complainant. It is further argued that the sentence of 50 years is neither harsh nor exessive.

Let me start by considering the question whether or not the plea was equivocal. The record shows that the languages used in conducting proceedings in the trial court were English, Kiswahili and Kipsigis. The record shows the appellant spoke in Kiswahili language when called upon to take plea.

It is therefore clear in my mind that the appellant understood the language of the court. Perhaps the most important ground which was ably argued by both sides is the question relating to the complainant's age. There is no dispute that the complainant was not subjected to age assessment. With respect, I agree with Mr. Motanya, that the **Sexual Offences Act** prescribes different sentences depending on the age of the victim. It is not lost in my memory that the appellant faced a charge under **Section 8(1) (3)** of the **Sexual Offences Act**. The aforesaid section does not exist in the Act. I can only infer that the prosecution meant to charge the appellant under Section 8(1) as read with Section 8(3) of the aforesaid Act. Unfortunately, on appeal this court only relies on the recorded proceedings leaving no room to make inferences.

Before accepting a plea of guilty, the trial magistrate must ensure that the charge is unambiguous. In the case before the trial court, the provision creating offence was not properly cited. This is complicated by the fact that the complainant's age was not ascertained. The charge sheet states the complainant's age to be 14 years while the P3 form indicates her age to be 13 years. In the facts outlined by the prosecutor, the age of the complainant was not mentioned except that stated on the P3 form. The prosecution outlined facts showing the appellant had taken the complainant as a wife. In fact it is said he introduced her to his mother as his wife. It is possible **Section 8(5)** of the **Sexual Offences Act** can apply to this case. I am not convinced the plea was unequivocal in the circumstances. The charge sheet is fatally defective in that it is based on a Section which does not exist. It cannot be said that the appellant understood the penalty for the offence. In his home made grounds the appellant avers that he pleaded guilty due to the injuries inflicted on him by the complainant's relatives. He claimed that at the time he was being taken for plea, he was seriously ill hence he was unable to appreciate the nature of the charge facing him. I have also looked at the P3 form and it is clear that the appellant was assaulted. With repect, I agree with the submissions of the appellant that he was not accorded sufficient time to recover from the shock to enable him appreciate the charge he pleaded guilty to.

I have come to the conclusion that the appeal is meritorious hence must asail. I am also of the opinion that this is a case in which the appellant should undergo a retrial. My decision is based on the fact that the evidence tendered *prima facie* is sufficient to sustain a conviction. In the end, the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant be held in custody awaiting to undergo a retrial. The case to be mentioned on 11th November 2013 before another magistrate of competent jurisdiction sitting at Sotik other than Hon. J. Kasam for further orders and directions in respect of retrial. The fresh trial be given priority.

Dated, signed and delivered this 8th day of November, 2013.

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J.K.SERGON

JUDGE

In the presence of

Mr.Koech holding brief for Mr. Motanya for Appellant

Miss. Muthee for Director of Public Prosecution

Mr. Koech- court clerk