



REPUBLIC OF KENYA
HIGH COURT AT ELDORET
CRIMINAL APPEAL 85 OF 2007

DESMON MTAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This appeal arises from the decision of the Hon. Resident Magistrate N.SHIUNDU in Iten Criminal Case No. 960 of 2007 delivered on the 5th October, 2007.

FACTS

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

There was also an Alternative charge of Indecent Act contrary to Section 11 (1) of the Sexual Offences Act No. 3 of the 2006.

The Appellant is said to have committed the offence during the month of May, 2007 at an unknown date at [Particulars withheld], and that the Appellant committed an act of penetration of the Vagina of JK, a girl aged 12 years.

The Appellant was committed on his own plea of guilty and sentenced to serve a term of seven (7) years imprisonment with hard labour in respect of the principal count.

The Appellant being aggrieved with the said decision filed this appeal and listed four (4) grounds of appeal in his Petition of Appeal which are as set down hereunder;

- 1) The learned trial magistrate erred in law in not warning/cautioning the Appellant, before convicting and sentencing him on the dangers/consequences of pleading guilty on the offence of defilement.
- 2) The learned trial magistrate erred in law and fact in not considering the nature of the offence and the evidence, the P3 form, produced by the Respondent, before convicting and sentencing the Appellant as such.
- 3) The learned trial magistrate erred in law and in fact in not ascertaining the age of the Appellant, who is a minor, before convicting and sentencing him as such.

4) The learned trial magistrate erred in law and in fact in convicting and sentencing the Appellant against the weight of the evidence by the Respondent.

At the hearing of the appeal the Appellant was represented by Learned Counsel Mr. Kibowen and the State was represented by Learned Counsel for the State Mr. Kabaka.

Counsel for the Appellant submitted that the plea taken was equivocal in that the language the plea was taken is not indicated on the court record.

Reference was made to the authority of **JOSEPH MAKENZIE VS REPUBLIC (2006) e KLR**

Counsel submitted that considering the gravity of the charge, the same ought to have been read to the Appellant in a language he understood and the trial court ought to have indicated the language in the proceedings.

Counsel further submitted that the court ought to have warned the Appellant on the consequences of pleading guilty.

Therefore on this ground of appeal, counsel argued that the plea was not unequivocal.

On the second ground of appeal, Counsel made reference to the P3 form. Counsel submitted that the P3 form formed the foundation of the Charge yet it was blank and no injuries were specified, therein.

Therefore the said P3 form had no probative value and the trial court ought to have taken into consideration the fact that the P3 form did not support the charge.

Counsel went on to argue ground of appeal number three that it was the Appellants contention that no age assessment was done to ascertain the ages of the Complainant and the Appellant.

Counsel submitted that no evidence was tendered to confirm that the Complainant was indeed twelve (12) years of age.

Evidence was not also tendered to ascertain the age of the Appellant who was in class eight (8) at that time and could not have been nineteen (19) years as alleged.

On the last ground of appeal, Counsel submitted that the exact date of the incident was not specified on the Charge Sheet. The incident is said to have taken place on an unknown date in May, 2007 and the Appellant was charged on the 5th October, 2007.

There was a time lapse of five (5) months and the trial court ought to have taken this fact into consideration.

In conclusion Counsel prayed that the Appeal be allowed and that the conviction be quashed and sentence set aside.

The Appeal was opposed by the State in its entirety.

Counsel for the State argued that the Appellant had pleaded guilty to the Charge and was therefore barred from appealing against conviction and was only allowed to appeal on the legality of the sentence as provided under Section 348 of the Criminal Procedure Code.

Counsel submitted that the plea was unequivocal as the charge had been read to the Appellant in four (4) different languages. It was the humble submission of the Counsel for the State, that the Appellant had understood the language and had pleaded guilty to the charge. The plea was therefore unequivocal.

Counsel further submitted that a plea of guilty dispenses with the issue of burden of proof and that

the prosecution need not call evidence to prove the Charge.

In the light of the P3 form, Counsel argued that the contents were supportive of the Charge and had the Appellant pleaded not guilty, evidence could have been called in to clarify issues that needed clarification.

Counsel submitted that the age of the Complainant was stated in the facts read out to the Appellant and that the issues of the penetration had been proved as the Complainant became pregnant.

Counsel further submitted on the illegality of the sentence awarded to the Appellant and referred to the provisions of Section 8(1) as read with Section 8(3) of the Sexual Offences Act whereby the statutory sentence provided therein is twenty (20) years imprisonment.

Counsel urged the court to invoke the provisions of Section 354 (3) of the Criminal Procedure Code and to alter and enhance the sentence.

In conclusion Counsel for the State prayed that the Appeal be dismissed as it lacked merit and that the conviction be upheld and the unlawful sentence be enhanced with the proper sentence.

Upon hearing the oral submissions of both Counsel for the State the Court finds the following issues for determination;

- a) unequivocal plea
- b) P3 form.
- c) Sentence.

This being the first appeal it is the duty of this court to re-evaluate re-assess and reconsider the evidence on record and come up with an independent conclusion. Refer to the case of **LUKAS KERARIO SANGAI –VS- REPUBLIC**

On the first ground of appeal, which is issue number (1). The court has perused the Record of Appeal at page 9 and notes that the record shows that there are four languages noted which are English, Kiswahili, Keiyo and Marakwet.

Thereafter the trial court indicates that the charge was read to the Appellant

“.....in a language he understands.....”

This court has perused the court record and finds that this specific language referred to by the trial court is not indicated on the court record.

This court is persuaded by the authority annexed and referred to by Counsel for the Appellant of **MAKENZIE –VS- REPUBLIC (2006) e KLR** and finds the plea taken to be equivocal and finds that the charge and each and every ingredient thereof was not explained to the Appellant in a language he understood.

This court goes a step further to state that it has perused the court file and finds that the Appellant was indeed a minor at the time he was charged with the offence.

The court record has a document which indicates the date of birth of the Appellant as 1992 therefore the Appellant was 15 years of age at the time he was charged.

This court concurs with Counsel for the Appellant’s submissions that the trial court ought to have ascertained the age of the Appellant before the plea was taken.

The trial court also ought to have accorded the Appellant legal representation as required by Section 72 of the Children's Act.

On issue number (2) related to the P3 form. This court has perused the same and concurs with the submissions of Counsel for the Appellant that the said P3 form has no probative value and that it does not support the charge.

Firstly upon perusal of the P3 form this court notes that the date and time of the alleged offence is indicated as "14/07/07 – midnight" whereas the Charge sheet states "an unknown date in May, 2007".

Secondly, the date and time the report was made to the police is stated as "2/10/2007". The trial court ought to have taken this time lapse into consideration, upon the document being admitted.

Lastly the Medical Officer who treated the complainant on the 3rd October, 2007 did not make a finding on penetration nor defilement. A finding was only made on a pregnancy that was 20-22 weeks.

Counsel for the State argued that the pregnancy proved that there had been penetration. However due to the anomalies in the Charge Sheet and the P3 Form there is doubt raised as to who was responsible for the pregnancy and the Appellant should be given the benefit of the doubt raised.

On the last issue No. (3) related to sentencing, this court concurs with Counsel for the State that the sentence was illegal and that the Statutory sentence provided for by the law is twenty (20) years.

The sentence is also illegal with respect to the rider "hard labour" as the same is not provided for under the Sexual Offences Act and the same is not provided for minors under the Children's Act.

In conclusion, this court reiterates that it finds that the plea taken was not unequivocal and finds that there was a fundamental breach of the Appellant's rights. The trial magistrate ought to have first ascertained the age of the Appellant and ought to have accorded him with legal representation as provided under Section 72 of the Children's Act.

The conviction herein is not safe and proper as the plea taken was not unequivocal and it therefore follows that the sentence is not merited. The court finds that this is not a suitable case to order for a re-trial as there is insufficient evidence on record to support a conviction.

For the reasons stated above the court finds the Appeal has merits and the same is hereby allowed.

The conviction is hereby quashed and the sentence is hereby set aside and the Appellant is set free, unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Eldoret this 4th day of October 2012.

A.MSHILA

JUDGE

CORAM:

Before: Hon. A Mshila J

CC: Andrew

Counsel for the Appellant: Buluma holding brief for Chepkonga for Appellant.

Counsel for the State: Kabaka

Appellant : Present.

Language: Kiswahili.

A.MSHILA

JUDGE