



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: KARANJA, MUSINGA, GATEMBU, J.J.A.)

CRIMINAL APPEAL NO. 33 OF 2020

BETWEEN

JULIUS MLANDA WANJE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (W. Korir, J.) delivered on 30th May, 2019

in

High Court Criminal Appeal No. 27 of 2018)

JUDGMENT OF THE COURT

1. Julius Mlanda Wanje, the appellant, was charged before the Chief Magistrates' Court at Malindi with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual offences Act, 2006. The particulars of the offence were that on 26th June 2017, at [Particulars Withheld] sub-location in Magarini sub-county within Kilifi County, he intentionally and unlawfully caused his male genital organ, namely his penis, to penetrate the female genital organ, namely vagina, of BJ, a girl aged 16 years old. He faced an alternative charge of committing an indecent act with a child.
2. Upon the charge being read over and explained to him, he pleaded guilty. The prosecutor then applied to the court to amend the charge sheet regarding the date of the offence and the appellant not objecting, the court allowed the amendment. The amended charge was then read and explained to the appellant whereupon he again stated that "it is true". After the facts were read out by the prosecutor, he yet again admitted the offence stating that he "did have sex with the girl" and that they "agreed". With that, a plea of guilty was entered and he was convicted on his own plea of guilty. He was subsequently sentenced to serve 15 years' imprisonment.
3. The appellant then appealed against the conviction and sentence before the High Court on the grounds that he was not cautioned on the dangers of pleading guilty to the offence; that the plea was invalid because the language used by the appellant was not captured in the record to establish that he understood; that the plea was incomplete because the P3 form was not produced; and that he was not represented by an advocate. Being satisfied that the appellant's plea was taken in compliance with the law and that all the ingredients of the offence were established, the High Court (*W. Korir, J.*) dismissed the appeal in a judgment dated 5th April 2019 delivered on 30th May 2019 and upheld the sentence.
4. In this second appeal, the appellant in his memorandum of appeal complains that the High Court failed "to consider the correct system of law on professionalism that is used in handling evidence was not adhered to" (sic); that he was improperly convicted on the evidence of a single witness; that the age of the complainant was not proved; and that his defence was not considered. In his supplementary grounds of appeal, the appellant has faulted the Judge for failing to consider that the P3 form and treatment notes, being medical evidence, were produced in evidence by a prosecutor in breach of Section 77 of the Evidence Act. As regards sentence, he complains that the Judge erred in upholding the mandatory minimum sentence that was imposed by the trial court which in effect denied the judicial officer the discretion in sentencing.
5. In his written submissions on which he relied during the hearing of the appeal, the appellant submitted that the P3 form and treatment notes were produced by the prosecutor in violation of Section 77 of the Evidence Act when the same should have been produced by a medical doctor; that the age of the victim was not established and neither was he positively identified; and that penetration was also not

established; and that the trial magistrate did not properly analyze and evaluate the evidence.

6. On sentence, the appellant referred to the decision of this Court in *Eliud Waweru Wambui vs. Republic, Criminal Appeal No. 102 of 2016* and faulted the High Court for upholding the minimum sentence and urged us to consider the mitigation he offered and set aside the 15 years minimum sentence that was imposed and substitute it with a commensurate sentence.

7. Opposing the appeal, **Mr. Nyoro Wambali**, learned counsel for the respondent, also relied on his written submissions. He urged that this being a second appeal the jurisdiction of the Court is limited by dint of Section 361 of the Criminal Procedure Code and thus it ought to consider matters of law only. He cited the case of *Karani vs. Republic [2010] 1 KLR 73*. He submitted further that the appellant's grievances were addressed by the High Court which found that his plea was taken in compliance with the law for plea taking in accordance with the principles enunciated in *Adan vs. Republic [1973] E.A 445*.

8. On sentence, counsel submitted that the 15 years' imprisonment term meted out, being the minimum sentence under section 8(1) of the sexual offences Act was not harsh.

9. We have considered the appeal and the submissions. Except for the complaint on sentence, all the other grounds of appeal are clearly based on a misapprehension that a full trial was conducted when in fact the appellant was convicted on his own unequivocal guilty plea. It bears repeating that upon the charge being read over and explained to him, he pleaded guilty stating:

“It is true. I did have sex with the girl. I wanted to marry her. I did ask my parents to speak with the girl. They paid some money. She is 15 years old I am 26 years. After our parents agreed I sent for her. She came she agreed. I married her we had sex severally as husband and wife. Then the brother came and took her away from me. I was later arrested.”

10. As already mentioned, the prosecutor then applied to the court to amend the charge sheet regarding the date of the offence and the appellant not objecting, the court allowed the amendment to the charge sheet. After the amended charge was read and explained to the appellant, he stated that *“it is true”*. Furthermore, after the facts were read out by the prosecutor, he again admitted the offence stating that he *“did have sex with the girl”* and that they *“agreed”*. With that, a plea of guilty was entered and he was convicted on his own plea of guilty.

11. Based on the foregoing, we are fully in agreement with the learned Judge of the High Court when he stated in his judgment that:

“Looking at the proceedings it is clear that all the steps that needed to be followed when taking plea were adhered to by the trial magistrate in this case.”

12. The appellant having admitted all the facts as set out in the charge sheet, the question of calling witnesses to establish the prosecution case did not arise and the complaints that evidence was improperly admitted or that reliance was wrongly placed on evidence of a single witness are clearly misplaced. The procedures of calling witnesses to produce evidence to establish the ingredients of the offence were foregone by his unequivocal guilty plea. The grounds of appeal are wholly baseless and unfounded.

13. As regards sentence, it is correct as urged by the appellant that the principle established by the Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR* in the context of the offence of murder under Sections 203 and 204 of the Penal Code, that the mandatory nature of sentence that denies the court the opportunity to exercise discretion in sentencing after considering an accused's mitigation was unconstitutional has been applied to sexual offences in appropriate cases. In this case, both the trial court and the appellate court in meting out and upholding the minimum sentence did not consider the circumstances in the case and the appellant's mitigation.

14. Having regard to the circumstances in which the offence was committed as stated by the appellant, we are minded to interfere with the sentence. We think a sentence of 7 years is commensurate. We accordingly set aside the sentence of 15 years imprisonment and substitute therefore a sentence of 7 years commencing from the date of conviction. To that extent only, we allow the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

W. KARANJA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar