



IN THE COURT OF APPEAL

AT KISUMU

(CORUM: OUKO (P), KOOME & SICHALE JJA)

CRIMINAL APPEAL NO. 23 OF 2015

BETWEEN

HENRY KERAGE NYACHOTI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High court of Kenya

at Kisii (Nagillah J.,) dated 20th February, 2015

in

H.C.CRA No 241 of 2011)

JUDGMENT OF THE COURT

[1] The only issue for determination in this appeal is whether the appellant was properly convicted and sentenced after he entered a plea of guilty. **Henry Kerage Nyachoti (appellant)** was on 17th October, 2011 arraigned before the Chief Magistrate's Court at Kisii. He was charged with the offence of defilement of a child below the age of eleven years contrary to the provisions of **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act**. The particulars being that on the 24th August, 2011 in Kisii South within Kisii County, he intentionally and unlawfully penetrated the vagina of VKG a girl aged 3 years using his genital organ namely, a penis.

[2] In the alternative the appellant faced the charge of indecent act, with a child contrary to **section 11 (1)** of the **Sexual offences Act**. The particulars being that on the 24th August, 2011 in Kisii South within Kisii County he did commit an indecent act with VKG a girl aged 3 years by rubbing his penis against her vagina.

[3] It is therefore necessary for us to revisit the record of proceedings as they happened on the day plea was taken. This is because courts have always been concerned that before a plea of guilty to a charge is recorded and acted upon, certain vital safeguards must be strictly complied with and it must appear in the record of the court taking plea that the precautions have been strictly complied with. This is what the record shows. On the 17th October, 2011 the appellant appeared before the Chief Magistrate's court in Kisii represented by an advocate by the name **Mr. Momanyi** (or Masese as the original handwriting of the trial court was hard to decipher). The record shows the substance of both the main and alternative charges and every elements thereto were read to the appellant in *Ekegusii* language which language he had said he preferred, he was asked whether he admitted or denied the truth of the charge and, the he said it was true. The record shows that the learned trial magistrate cautioned the appellant about the seriousness of the charge and the sentence it carried and the appellant still pleaded guilty to both the main and alternative charge.

[4] The plea of guilty was entered and the prosecutor proceeded to give the following facts;

“The accused person and the complainant are neighbours. On 24th August, 2011 the parents of VK went to their shamba not far from home leaving V and her sister B playing. Then they saw many people at their home. G, mother of the complainant went to the home and got information from the crowd amongst them the child's aunt that the child had been defiled by the accused who then ran away. The girl could not stop and was bleeding from her private parts. They rushed her to Kisii level 5 hospital where she was treated and admitted. The matter was reported to Gesonso Police Station and to vigilantes. On 14/10/2011 vigilantes

among them Reuben Onduso and George Mokuu took the accused to Gesonso police station”.

“...Court: The accused is found guilty and convicted on his own plea of guilty.

Sentence: Accused to serve life imprisonment. R/A 14 days explained.”

[5] Upon conviction and sentence of the appellant, the record shows that he filed a criminal appeal, being **Criminal Appeal no. 241 of 2011**. Although the same was admitted for hearing before a single judge on 9th July, 2012, while it was pending for hearing, the appellant filed a petition, **No. 62 of 2014** and on 18th December, 2014, **Mr. Nyawanda** learned counsel for the appellant applied to abandon the appeal and opted to prosecute a constitutional petition. The petition essentially raised the same issues as the appeal. The appellant challenged the conviction on the grounds that the magistrate recorded that he was represented by an advocate called **Momayi** who was not known to him as his counsel was **G. J. M. Masese**. The appellant took issue with the medical report that was produced in evidence to support the injuries sustained by the complainant as it showed the child was taken to hospital twice on the same day; that his rights were not explained to him. The appellant prayed that the whole proceedings leading to his conviction be declared a mistrial and the matter be tried *de novo*.

[6] After hearing the petition the learned Judge was not convinced of its merits, it was dismissed and in doing so this is what he said in his own words.

“Counsel has not helped his client by bringing this petition. Mistake in names may have arisen from deciphering the learned magistrate’s handwriting. Masese appeared as Momanyi. This does not vitiate both the conviction and the sentence.

Accordingly, the petition herein be and is hereby dismissed. There is right of appeal”

This is the decision that has provoked the instant appeal that is predicated on some five (5) grounds of appeal in which the appellant challenges the conviction and sentence in that;

i. He pleaded guilty because he was threatened and beaten by the police officers who forced him to make a confession and subsequently pleaded guilty.

ii. That the trial magistrate relied on a medical report namely a P3 Form that was not signed or stamped.

iii. That the appellant was not accorded a fair trial as there was no evidence of the appellant’s mental status that was adduced.

iv. That no birth certificate or document was produced to prove the age of the complainant, age being a key determinant of the sentence to impose under the Sexual Offences Act.

v. That the High court judge failed to address the issues raised about the incompetent proceedings that contained wrong names and dates.

[7] During the plenary hearing, the appellant who was acting in person relied on his written submissions and did not make any highlights. In his written submissions, the appellant argued that he was forced to plead guilty; that his mental status and ability to plead was not confirmed by medical evidence; that the court failed to note glaring irregularities in the medical reports that was relied on to support the charge; that there was a grudge between the appellant and the parents of the complainant who were neighbours; that the sentence meted on him was manifestly excessive; that his constitutional rights as provided under **Article 47** and **48** were violated.

[8] Opposing the appeal was **Mr. Kakoi** learned Principal Prosecuting Counsel he submitted that the plea was taken procedurally according to the provisions of **section 207** of the **Criminal Procedure Code (CPC)** and the guidelines set in the case of **Adan vs. Republic [1973] EA 445**. The appellant was represented by an advocate by the name **Masese** and although there could have been a misspelling through a typographical error of the name as **Momanyi**, that alone did not vitiate the proceedings as the appellant was warned of the seriousness of the offence he was pleading to. On sentence, the appellant did not say anything in mitigation, the complainant who was defiled was only aged three (3) years and therefore life sentence is what is provided under the **Sexual Offences Act**. On the appellants mental status counsel submitted that there is a presumption under **section 11** of the **Penal Code** that every person is presumed to be of sound mind and a medical examination is not a precondition to taking a plea of an accused person. Counsel therefore urged that should we be inclined to interfere with the sentence, it should not be less than twenty (20) years.

[9] We have considered the entire record of appeal, and deliberated on the submissions and the relevant law. As stated above, the appellant pleaded guilty to the charge and perhaps while aware of the provisions of **section 348** of the **CPC** which bars an appeal in regard to a conviction and sentence based on a plea of guilty, the appellant filed a constitutional petition. This is what the said section states:-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by subordinate court, except as to the extent and legality of sentence”

Be that as it may, the issue that we decipher for determination remains the same whether the appellant was accorded a fair and impartial trial taking into account the entire record of proceedings.

[10] Was the plea taken by the appellant unequivocal? The requirements for recording a guilty plea are well set out under **section 207** of the **CPC**. They were further elucidated in **Adan vs. Republic [supra]** as follows:

i. The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language he understands.

ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts.

iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered.

v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.

[11] We have reproduced the record of proceedings before the trial magistrate in the preceding paragraphs so as to examine whether the court took into account all the precautionary measures when plea of guilty was entered. It is clear to us that the learned trial magistrate scrupulously followed the procedure provided under the law. The charge was read to the appellant in *Ekegusii* language, the court duly cautioned the appellant of the seriousness of the offence he was pleading to and at the time he was represented by counsel. The appellant pleaded guilty and when the facts were read to him he affirmed the plea of guilty after which he was convicted and sentenced. We find the entire array of procedure as provided in the law was duly followed, and the allegations that the appellant's fundamental rights to fair trial were violated is without merit as we are not able to pinpoint any lapse in the proceedings where the appellant was prejudiced.

[12] Similarly, if the appellant wanted to challenge the facts that is the medical evidence that was produced; the age of the complainant; the allegations of torture and his mental capacity to comprehend the charges, he had an opportunity to do so when the plea was taken. Moreover under **section 11** of the **Penal Code**, every person is presumed to be of sound mind, and to have been of sound mind at the time when the pleas or action in question was taken until the contrary is proved.

[13] The appellant has also argued that the life sentence is harsh; counsel for the state took a lenient view that should this Court interfere with the sentence, it should not be below 20 years. We are cognisant of the recent trends in sentencing jurisprudence bearing in mind the Supreme Court decision in the case of in **Francis Karioko Muruatetu & Another vs. Republic – Petition No. 15 of 2015** consolidated with **Petition No. 16 of 2015** (*Muruatetu's case*). The appellants were sentenced to death for the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. **Section 204** of the **Penal Code** provides:

“Any person convicted for murder shall be sentenced to death.”

After their appeals were dismissed by the Court of Appeal, they appealed to the Supreme Court. The main issue canvassed in the appeal was whether or not the mandatory death penalty is unconstitutional. The Supreme Court said at paragraph 48:

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right”

Although this was a charge of murder, by parity of reasoning, the courts across board have applied the *ratio* in the *Muruatetu Case* even to sexual offences matters.

[14] In this case the appellant did not offer any mitigation although he was given an opportunity to do so. We have anxiously considered this aspect of the appeal, the seriousness of the offence, the age of the victim who was only three (3) years old at the time and the lifelong effect this heinous crime was likely to have on the life of an innocent child. Taking the totality of all the circumstances we are not inclined to interfere with the life sentence. There is a good reason why the framers of the law made provisions for life sentence for this kind of an offence.

[15] In the upshot we find no merit in this appeal, which we dismiss in totality.

Dated and delivered at Kisumu this 31st day of January, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR