IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: W. KARANJA, SICHALE & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 149 OF 2009

BETWEEN

GEOFFREY KORIR.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from a conviction and sentence of the High Court of Kenya at Kericho

(Ang'awa, J.) dated 3*rd August, 2009 in* H. C. Cr. A. No. 30 of 2008)

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JUDGMENT OF THE COURT

The appellant, **Geoffrey Korir,** was charged at the Senior Resident Magistrate's court, Bomet with the offence of defilement of a girl aged 16 years contrary to ***section 8(1)*** of the ***Sexual Offences Act*** No. 3 of 2006. Particulars of the offence were that on the 30th day of September, 2008 at a place named in the charge sheet he unlawfully and intentionally committed an act that caused penetration to "WC", aged 16 years. When the charge was read out to him and elements thereof explained, and when asked whether he admitted or denied the charge, he replied in Kipsigis language that *"It is true"*. A plea of guilty was entered.

The Court Prosecutor addressed the trial Magistrate setting out the facts of the case including production of a P3 form and the appellant confirmed that the facts were correct. In mitigation, the appellant said that he was 18 years old and that he was sorry. It is then recorded that the trial Magistrate had considered the offence the appellant was charged with, had considered mitigation given and the appellant was sentenced to serve 20 years imprisonment.

In a petition of appeal drawn for the appellant by his lawyers M/s Motanya & Co. Advocates to the High Court of Kenya at Kericho the trial Magistrate was faulted for admitting what was said to be hearsay evidence; that the Magistrate had incorporated into the judgment matters not canvassed; that the Magistrate had erred in law in not considering the appellant's unsworn evidence and in ignoring appellant's witnesses evidence; that the appellant should have been taken for a medical examination to remove the possibility of a 3rd person being the offender; that evidence of prosecution witnesses was contradictory, full of discrepancies; that judgment was against the weight of evidence; that sentence awarded was bad; that the many hypothesis present were not considered and, finally, that the sentence was harsh and excessive in all circumstances of the case before the trial court. We found it necessary to summarize all the grounds taken at the High Court because, as already stated, there had been no trial through a hearing before the trial Magistrate, the appellant having admitted the charge leading to conviction and sentence. It is therefore difficult to see how most of those grounds could be taken.

Hearing of the first appeal commenced before Ang'awa, J., on 25th May, 2009 when it was adjourned on a number of occasions for various reasons. On 21st July, 2009, Mr. J. M. Motanya, advocate appearing for the appellant, addressed the court stating that he would argue *"....paragraph 4, 5, 8 & 9"* which we take to be grounds of appeal which we have summarized in this judgment. He then proceeded to make submissions to the effect that the appellant was at the material time a minor and should not have been sentenced to a term of imprisonment and should have been dealt with in accordance with statutes that provided for child offenders. He ended by stating:

> **"....the conviction is fine, we say court to invoke the acts..."**

The court ordered for an age assessment to be conducted on the appellant at the Provincial General Hospital, Nakuru and that a report be made to court. When that was done it was found that the appellant was 19 years old. In a judgment delivered on 3rd August, 2009 the learned Judge found that the appellant was not under age when the matter was before the trial court and the appeal was dismissed. A Notice of Appeal followed and in a Supplementary Grounds of Appeal drawn by the said advocates, Motanya & Co. Advocates, for the appellant, 9 grounds are set out which we summarize thus: that the "Magistrate" erred in law in failing to read and explain to the appellant the charge and ingredients thereof in a language which he understood; that the law was not adhered to in taking plea; that Magistrate and Judge erred in failing to satisfy themselves that the plea was totally unequivocal; that burden of proof was shifted to the appellant against the law; that the appellant should have been taken for medical examination; that decision was against weight of evidence and finally, that the High Court erred in not giving the matter a fresh analysis to reach an independent conclusion.

The duty of this Court on a second appeal is to consider only issues of law if any are raised but not matters of fact which are the province of the trial court and the first appellate court.

On whether the plea taken by the trial Magistrate was properly taken as required by law, we have set out in this judgment the events that took place when the appellant was presented at the Bomet Court. The charge of defilement was read out whose particulars included the fact that he had defiled "WC", aged 16 years. The language is shown as "English/Kiswahil/Kipsigis" and it is recorded that it was read in the language which the appellant understood to which he replied in Kipsigis language that it was true. Particulars of the offence were then read out and a P3 Form produced which indicated amongst other things that "WC" was 16 years old. The appellant admitted the facts as correct and was accordingly convicted. The plea was properly taken and admission of the charge as correct and the particulars thereof was unequivocal, all these having been interpreted to the appellant in his language of choice, Kipsigis. We note, indeed, that the issue was not taken by the appellant on the first appeal.

This Court in ***Adan v Republic*** ***[1973] IEA 445*** set out the steps to be taken by a trial court where an accused person offered a plea of guilty to a charge. The plea should be recorded after the following steps are followed:

> **"i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands; (i)the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
>
> **ii. the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
>
> **iii. if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;**
>
> **iv. if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."**

The trial Court followed all the said steps and did not err in any way.

Having found that guilty plea was properly entered by trial Magistrate we cannot find any other legal issue raised by the appellant. The sentence awarded was within the parameters allowed by the Sexual Offences Act. There is no merit in this appeal which is accordingly dismissed.

Dated and delivered at Nakuru this 21*st* day of March, 2019.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR