IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA & OTIENO-ODEK, JJA)

CRIMINAL APPEAL NO. 85 OF 2017

BETWEEN

JOSEPH WAMBUA MBUVI......................................APPELLANT

AND

REPUBLIC...RESPONDENT

(An appeal against the judgment of the High Court of Kenya

at Machakos (P. Nyamweya, J.) dated 27th October 2016

in

HC.CR.A.NO. 187 OF 2016)

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JUDGMENT OF THE COURT

1. The appellant, ***Joseph Wambua Mbuvi***, was charged with defilement contrary to ***Section 8 (1)*** and ***(2)*** of the **Sexual Offences Act No. 3 of 2006**. The particulars of charge were that on the 9th day of October 2011 at Machakos County within Eastern Province, he intentionally and unlawfully caused his penis to penetrate the vagina of ***MNM***, a child aged 11 years.

2. On 11th October 2011, the appellant was arraigned before the trial court for plea. Interpretation was done from English to Swahili language; the substance of the charge and every element thereof was read. The appellant in his own words stated: "*It is true, I slept with the child*." The court then explained the charge in Kiswahili. The appellant responded "*It is true. I did*." A plea of guilty was entered.

3. The record further shows that the prosecutor once again read the facts and particulars of the charge. The appellant in his own words responded: "*Facts are correct. I had sex with the child. I have accepted. I did it*." Upon accepting the facts, the magistrate convicted the appellant on his own plea of guilty. The appellant offered no mitigation. He was sentenced to life imprisonment.

4. Aggrieved by the conviction and sentence, the appellant lodged a first appeal to the High Court. In his grounds of appeal, he urged the court to reduce the sentence; that he was a first offender, was remorseful and repentant; he would not repeat such an act again; and that he had a young family with children.

5. The High Court dismissed his appeal and upheld conviction and sentence. In dismissing the appeal, the learned judge expressed herself thus:

> ***"It is evident he admitted more than once having sex with the complainant as was stated in the facts and his plea of guilty was therefore unequivocal. The elements of defilement of penetration and positive identification of the appellant were thereby shown by the facts. The other element of age were also proved by the P3 filled form the complainant produced by the***
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> ***prosecution as its Exhibit 2, which indicated that the complainant was 11 years old.***

Lastly I note that even though the appellant was a first offender, the minimum sentence for the offence of defilement of a child aged 11 years is life imprisonment, and this court therefore has no discretion to revise or reduce the sentence imposed upon the appellant.

I accordingly uphold and affirm the conviction of the appellant"

6. Aggrieved, once again, the appellant has lodged a second appeal to this Court. The grounds in the memorandum of appeal are:

> *"(i) The judge failed to appreciate the prosecution had failed to prove its case to the required standard.*
>
> *(ii) The judge erred by relying on evidence which was contradictory.*
>
> *(iii) The court erred in failing to find crucial witnesses were never summoned and thus the prosecution case remain unproved.*
>
> *(iv) The judge erred in shifting the burden of proof to the appellant.*
>
> *(v) The judge erred in failing to find the trial court did not give the appellant an opportunity to put forward his defence.*
>
> *(vi) The trial court proceedings were not been furnished to the appellant."*

7. In an amended grounds of appeal, it is urged that the trial court erred in convicting the appellant on a plea of guilty without warning him of the consequences of the plea; the two courts below erred in failing to find the age of the complainant was not proved; and that the two courts below erred in failing to find the prosecution had not proved its case to the required standard.

8. At the hearing of this appeal, the appellant was in person and the State was represented by ***Ms Wangele***, Senior Principal Prosecution Counsel.

APPELLANT'S SUBMISSION

9. The appellant in his written submissions cited the case of **R -v- Amos Karuga Karatu [2008] eKLR** urging that his right to a fair trial was violated to the extent that he was not told the nature of the sentence the plea of guilty would attract; and that the trial magistrate should have cautioned him before entering a plea of guilty. It is contended that the age of the complainant was not proved. Citing the case of **Kaingu Elias Kasomo -v-R, Malindi Cr. Appeal No. 504 of 2014**, the appellant submitted that age is a key ingredient in defilement and no evidence was led to prove the age of the complainant; that no assessment was made to ascertain the complainant's age apart from the P3 Form that was tendered in evidence; that no birth certificate was produced; and that a P3 Form cannot establish and prove the age of a complainant. Based on the foregoing, the appellant contends that the prosecution did not prove its case beyond reasonable doubt.

RESPONDENT'S SUBMISSION

10. The respondent submitted that the prosecution had proved its case to the required standard; that the appellant was convicted on his own plea of guilty; in his own words he said it was true he committed the offence; and he confirmed the particulars and facts of the case as read out in court. On age of the complainant, it was submitted that the P3 Form tendered in evidence established and proved the age of the complainant as 11 years. On the contestation that the appellant was not warned of the consequences of his plea of guilty, it was submitted that in cases of defilement, the law does not require an accused person to be cautioned or warned of the consequences of a plea of guilty or sentence that may be meted out. The State submitted that whereas it is prudent for a trial court to warn and caution an accused person who enters a plea of guilty, it is not a mandatory requirement in the offence of defilement. In concluding its submission, the respondent urged us to find the two courts below properly convicted the appellant and sentenced him to the mandatory minimum life sentence.

ANALYSIS

11. We have considered the appellant's amended grounds of appeal, the submissions made by both parties and the authorities cited. This is a second appeal against conviction and sentence. By dint of ***Section 361*** of the **Criminal Procedure Code**, a second appeal is confined to matters of law only. This Court restated as much in **Karingo -vs- R (1982) KLR 213** at p. 219;

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"**

12. In **John Mutua Munyoki -v- Republic [2017] eKLR**, this Court stated that under the **Sexual Offences Act** the main elements of the offence of defilement are as follows:

> *(i) The victim must be a minor, and*
>
> *(ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.*

13. The record shows that the appellant pleaded guilty to the offence as charged after the particulars were read out to him. It is undisputed

that the Constitution guarantees an accused person certain rights; among these is the right to due process and fair trial. When an accused person pleads guilty, he/she relieves the prosecution the duty to call witnesses; he gives up his right to cross-examine them and the right to put forward his/her defence. In a plea of guilty, the factual issues will not be decided by the trial court; all that is left is for an accused to be sentenced- (see **David Mbewa Ndede vs. Republic Cr. App. No. 1 of 1989 (unreported)** We are cognizant that a guilty plea does not necessarily mean an accused person gives up the right to appeal his conviction. If the accused seeks to challenge the constitutionality of the statute that he recast, he may still have the right to appeal. Where a plea of guilty is entered the trial court must ensure before conviction that the facts disclose the offence charged.

14. In this matter, the record shows the appellant pleaded guilty. The law and practice on the taking and recording of plea of guilt is stated in **Adan -v - Republic (1973) EA 445 at 446:**

> **"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded.**

15. In **Hando S/o Akunaay -v - Rex (1951) 18 EACA 307** it was stated as follows:

> **"…before convicting on any such plea of guilty, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent."**

16. In this appeal, we have examined the record of appeal. We are satisfied that the plea of guilty was unequivocal. Twice over, the appellant admitted that he committed the offence as charged. By pleading guilty, ***Section 348*** of the **Criminal Procedure Code** bars the appellant from preferring the instant appeal. The Section reads:

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

17. In **Olel - v -Republic [1989] KLR 444**, it was held:

> **"Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely."**

18. In this appeal, the appellant's conviction was based on his unequivocal plea of guilty. It follows ***Section 348*** of the **Criminal Procedure Code** bars him from lodging the present appeal save as to the extent or legality of the sentence, if at all. We note that a plea of guilty does not necessarily bar a convicted person from appealing if the challenge is on legality of the sentence or constitutionality of the conviction.

19. Another ground of appeal is the sentence of life imprisonment meted upon the appellant. Sentencing is a question of fact and it is always at the discretion of the trial court. In this matter, the appellant does not contend the sentence meted was either illegal or unlawful. In **Wanjema -v- Republic (1971) EA 493** this Court stated as follows regarding interference with sentencing:

> **"[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."**

20. In this matter, there is nothing on record to show that the trial court erred in the exercise of its discretion in meting out the life sentence for the offence as charged. There is nothing on record to show that the learned judge erred in upholding the sentence. As stated before, sentence is a question of fact and in a second appeal our jurisdiction is confined to matters of law. In **David Munyao Mulela & Another -vs- Republic [2013]** this Court expressed itself as follows:

> **"The complaint on severity of sentence is misplaced firstly because it was not an unlawful sentence imposed and secondly the issue of severity of sentence cannot be before us as it is a matter of fact."**

21. In **M K M vs Republic [2018] eKLR** this Court faced with a similar "appeal" rendered itself thus: -

> **"Indeed, we need to state quite categorically that the practice now seeming to gain traction and notoriety, of second appeals against severity of sentence only being presented as mitigation statements or the like, has no foundation in law, is contrary to statute and should stop. It is also worth recalling, that when all a person presents on a second appeal is a mitigation, there really is no appeal because an appeal under our Rules is based on a memorandum of appeal."**

22. On the facts, the learned Judge properly analysed the documentary evidence and came to the conclusion that penetration was proved; that

the complainant's age was similarly proved and that the sentence imposed was lawful.

23. Persuaded by the merit of the dicta of this Court as stated in **M K M -vs-Republic** (supra), the appellant's submission on the life sentence meted to him has no merit.

24. The upshot is that this appeal has no merit and is hereby dismissed.

Dated and delivered at Nairobi this 24th day of May, 2019

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. OTIENO-ODEK

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR