



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, H. OKWENGU & J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 183 OF 2014

BETWEEN

VINCENT OCHIENG ARINGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Kisumu, (Chemitei, J.) dated 20th day of January, 2014

in

H.C.CR.A. NO. 40 OF 2013)

JUDGMENT OF THE COURT

[1] The appellant has appealed against the judgment of the High Court (**Chemitei, J**) dismissing his appeal against his conviction and sentence for defilement contrary to **section 8 (1)(3)** of the **Sexual Offences Act**.

[2] The appellant was charged before the Principal Magistrate (PM) at Bondo with defilement contrary to **Section 8 (1)(3)** of the **Sexual Offences Act, No. 3 of 2006**, the particulars being that on 20th March, 2013, at about 4.00 p.m. at West Sakwa Location in Bondo District, within Siaya County, the appellant unlawfully and intentionally caused his penis to penetrate the genital organ (vagina) of the complainant, a minor aged 3½ years.

[3] The appellant also faced an alternative charge of committing an indecent act with a girl contrary to Section 11 (1) of the Sexual Offences Act. The facts of the case as presented by the prosecution were that the complainant, aged 3½ years was sent to fetch water by her mother. She was accompanied by her brother. The appellant then sent the complainant's brother away to buy sweets after which he led the complainant to a bush and proceeded to defile her. Upon the complainant returning home, her mother noted fluids on her private parts and on examination, found that her daughter had been defiled after which she reported the matter to Bondo Police Station.

[4] When the charge was read out to the appellant on 28/2/2013 and translated to him in the Luo language, he is recorded as having stated "*it is true*". The facts were then narrated to the appellant by the prosecution to which the appellant responded "facts are true". On this admission, the trial magistrate entered a plea of guilty and proceeded to convict the appellant. The appellant was treated as a first offender and in mitigation, asked for leniency and forgiveness. The court after considering the appellant's mitigation sentenced him to twenty years imprisonment.

[5] The appellant appealed against conviction and sentence to the High Court. In dismissing the appeal, the High Court stated that the appellant having pleaded guilty to the charge, was estopped from trying to prove otherwise to the Court.

[6] The appellant has now appealed to this Court and his appeal is premised on grounds that the complainant's age was not proved; that the sentence was harsh and excessive and that the learned judge erred in dismissing his defence evidence.

[7] At the hearing, the appellant was not represented. He argued out his grounds of appeal in person. **Ms. Tumaini Wafula**, the Assistant Director of Public Prosecutions filed written submissions and submitted that the procedure for entering a plea of guilty was followed as set out in the case of **Adan –vs- R (1973) EA 446**; that the sentence handed to the appellant was not harsh as severity of a sentence was a matter of fact and not law, hence not subjected to a second appeal and that a re-trial could not be ordered as the appellant was properly convicted.

[8] There is no basis for the appellant to raise grounds that his defence was not considered or that the prosecution failed to prove the complainant's age. As pointed out by the learned Judge, the appellant is estopped from challenging his plea of guilty by virtue of Section 348 of the Criminal Procedure Code which provides as follows;

“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.”

[9] The trial court applied the legal principles in plea taking as set out in **Adan –vs- R** (supra) where the Court held;

“(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.

(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 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.

(iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and 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.”

Looking at the record of appeal, it is clear that the trial court followed the procedure as set out in **Adan –v- R** (supra) and this Court, like the High Court, is satisfied that the appellant indeed pleaded guilty to the charge. In spite of his grounds of appeal, the appellant has stated clearly in his written and oral submissions that his appeal is against sentence only.

[10] As regards sentence the appellant was charged under **section 8(1) (3)** of the **Sexual Offences Act**. This was an error as there is no such section. It seems that the prosecution intended to charge the appellant under **Section 8(1)** as read with section **8(3)**. **Section 8(3)** provides that a person who commits an offence of defilement with a child aged between twelve and fifteen years is liable to imprisonment for a term of not less than twenty years. In this case, the complainant was aged 3 ½ years and appellant should have been sentenced to life imprisonment as provided in section 8(2) of the Sexual Offences Act.

[11] However, this Court has held in **Dismas Wafula Kilakwe v Republic – Kisumu, [2018] eKLR**, that section 8 of Sexual Offences Act does not take away the discretion of the Court in sentencing. Since the respondent does not seek the enhancement of the sentence, and as the appellant was not warned of the possibility of the enhancement of the sentence before he prosecuted the appeal, it would not be just to interfere with the sentence.

[12] For the foregoing reasons, the appeal is incompetent and without merit. Accordingly, the appeal is dismissed.

Dated and delivered at Kisumu this 27th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR