IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, P.O. KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 9 of 2015

KENNEDY KAUNDA.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kakamega

(S. Chitembwe J) delivered on 4th June 2014

in

Kakamega HC Cr. Appeal No. 91 of 2012)

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JUDGMENT OF THE COURT

1. This appeal involves an unequivocal plea of guilty and constitutionality of a mandatory minimum sentence. The appellant, Kennedy Kaunda, was charged with the offence of defilement of a boy child contrary to **Section 8 (1)** and **(3)** of the **Sexual Offences Act**. The particulars were that on 9th January 2012 in Vihiga County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of A.N. a juvenile aged 14 years.

2. The prosecutor presented the facts of the alleged crime as follows:

> *On the 9th day of January 2012, the complainant A.N. a boy aged 14 years was invited by the accused pastor to his residence at Kapchengum. Since the complainant knew the accused as his former pastor at Kigangu PAG Church he could not refuse his invitation. On arrival, the accused person prepared tea for the complainant and later on the accused asked the complainant to go and sleep on his bed.*
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> *The accused then approached him on his bed and removed his clothes and of the complainant and ordered the complainant to sleep on his stomach. The accused then removed his clothes and started defiling the boy by inserting his penis into his anus. The victim tried to scream for help but the accused covered the complainant's mouth with his hands and he forced the boy to sleep there, since he could not go back to where he had come from in Mahanga location.*
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> *On 10/1/2012, in the morning, the accused gave the complainant a bicycle and asked him to go home and not to tell anyone. As the victim was going home, the villagers stopped him and wanted to know where he got the bicycle from since the bicycle was in bad shape. It was at this juncture that the complainant revealed to the villagers all that had transpired between him and the accused the whole night and how he had been defiled by the accused. The villagers went to the accused person's residence but they could not find him. They ganged up and went to Jepkoyai AP Camp and reported the matter.*

3. Upon is arrest, the appellant and the complainant were taken for medical examination which revealed that the complainant had been defiled while the appellant had pains in his penis on palpation which showed that he had defiled a child.

4. The appellant pleaded guilty to the charge as follows:

> *It is true only that he did not scream. All the other facts are true only that he did not scream.*

5. The magistrate entered a plea of guilty on account of the appellant's own admission. In mitigation, the appellant sought for pardon from the court and swore never to repeat the crime again. The magistrate considered the offence to be serious and sentenced the appellant to a term of twenty (20) years' imprisonment.

6. Aggrieved by the conviction and sentence meted upon him, the appellant lodged a first appeal to the High Court seeking reduction of sentence. He stressed that twenty years' imprisonment was harsh considering he was a first offender and that at the time of the offence, he was experiencing psychological imbalance. He sought the court to review the sentence in favour of a less severe one.

7. The learned Judge in dismissing the appeal expressed as follows:

> *From the record of the trial court it is clear that the appellant understood all what was happening in court. There is no complaint that he was mentally disturbed. He was taken to the doctor at Vihiga hospital who filled in his P3 form but did not raise the issue of being mentally disturbed. When the facts were read they were detailed and the appellant did not contest them. From the record of the trial court it is clear that the appellant willfully (sic) pleaded guilty to the charge. The pleas (sic) was unequivocal and the conviction is proper. The appeal is an afterthought and the appellant's conduct shows that he committed the offence. During mitigation he asked for leniency and he even informed the court when the facts were read that the complainant did not scream. I am satisfied that the trial magistrate conducted the plea taking properly and there is no violation on the appellant's rights or miscarriage of justice. I do find that the appeal lack merit and the same is disallowed.*

GROUNDS OF APPEAL

8. Dissatisfied by dismissal of his appeal, the appellant has lodged the instant second appeal on three grounds namely: that the judge erred in upholding conviction yet the plea of guilty was equivocal; that the judge erred in failing to subject him to a mental assessment and the judge failed to appreciate the aggravating circumstances that led him to commit the crime.

9. During the hearing of the appeal, the appellant appeared in person while the prosecution was represented by Mr Kakoi, the Principal Prosecution Counsel. Both parties had filed written submissions.

APPELLANT'S SUBMISSIONS

10. The appellant faulted the learned judge for not re-evaluating and re-analyzing the evidence as is required of a first appellate court; that failure to properly re-evaluate the evidence led the learned judge to uphold the severe sentence meted by the trial magistrate. The appellant cited the case of **Issac Ng'ang'a alias Peter Ng'ang'a Kahinga -v- Republic Cr. Appeal No. 272 of 2005** to support his submission that the learned judge failed in his duty as the first appellate court. He submitted the trial court erred in entering a plea of guilty when the plea as taken was equivocal.

RESPONDENT'S SUBMISSIONS

11. The respondent in opposing the instant appeal averred that by dint of **section 361(a)** of the **Criminal Procedure Code**, this Court's jurisdiction as a second appellant Court is limited to matters of law. Counsel cited the decision in **Njoroge –v- Republic [1892] KLR 388** and **Chemagong –v- Republic [1984] KLR 611** to support of the submission.

12. Submitting on the contestation that the appellant's plea was equivocal, counsel submitted that the trial court followed plea-taking procedure as stipulated in **section 207** of the **Criminal Procedure Code**. That there was no procedural lapse in plea taking and the appellant's plea was unequivocal plea of guilty when he stated: *"It is true only that he did not scream"*.

13. On the issue of the mental assessment, it was submitted that there was no basis for such an assessment as the record shows the appellant was cognizant of and conscious of the proceedings; that the appellant knew the offence with which he was charged; and he never raised the issue of his psychological imbalance when he was taken to hospital for medical examination.

14. In concluding his submissions, it was stated that during mitigation, the appellant had been accorded a chance to explain the aggravating circumstances that led to the commission of the crime but he only asked for forgiveness.

ANALYSIS and DETERMINATION

15. We have considered the grounds of appeal as well as the submissions made by both parties and the authorities cited. At the outset, we remind ourselves that **Section 2 of the Sexual Offences Act** defines genital organ to include the whole or part of male or female genital organs and for purposes of this Act includes the anus. The particulars of the instant case may perforce be categorized as sodomy under the Penal Code.

16. The central ground of appeal in this matter is the appellant contends his plea was equivocal and therefore the trial magistrate erred in entering a plea of guilty and the learned judge erred in upholding the conviction. It is our duty to examine and determine as a matter of law whether the plea by the appellant was unequivocal and if the two courts below were correct in entering and upholding a plea of guilty. The procedure and guideline for plea taking is well articulated in the case of **Adan vs Republic [1973] EA 445** where it was 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."

17. In **Obedi Kilonzo Kevevo - v - Republic [2015] eKLR** this Court stated as follows in relation to plea taking:

[T]he importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence.

The facts as read to the accused must disclose the offence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty, thereafter, the facts are narrated to the accused person and he/she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence. Otherwise, the plea is not unequivocal.

18. *In **Ombena –v- Republic** **[1981] KLR 450**, it was stated* that whether a guilty plea is unequivocal or not depends on the circumstances of the case.

19. In this matter, we have considered the record of appeal and in particular, the proceedings at plea taking before the trial court. The record shows that on 11th January 2012, after the charge was read to the appellant, he pleaded "It is true." The prosecutor then read the particulars of the charge. The appellant replied and stated "It is true only that he did not scream. All the other facts are true only that he did not scream."

20. Going by the record, we are satisfied that the trial court read to the appellant each and every element of the charge to which he pleaded guilty. We are further satisfied that the prosecution read out the facts to the appellant, of which he responded that: *"It is true only that he did not scream. All other facts are true only that he did not scream"*. The appellant did not change his plea and neither did he dispute the facts save for the part where he claimed that the complainant did not scream. Not screaming cannot be a possible defence to the charge that faced the appellant that could have forced the hand of the court to enter a plea of not guilty. The two courts below were therefore right in overtaking that aspect of the plea. We further note that the appellant was aware of proceedings of the court and understood the charge levelled against him thus the judge had no basis to subject him to a mental assessment test. From the foregoing, we are satisfied that the appellant's plea of guilty was unequivocal.

21. We now consider the constitutionality and legality of the sentence meted out on the appellant. The appellant was sentenced to a twenty (20) year term of imprisonment. We recognize that the sentence was meted pursuant to **Section 8 (3) of the Sexual Offences Act** which imposes the minimum sentence as 20 years. Both the trial magistrate and the learned judge adhered to the said provision.

22. The issue of the constitutionality of mandatory sentences was canvassed at the Supreme Court in **Francis Karioko Muruatetu & another - v -Republic [2017] eKLR** where it was held that mandatory sentences deprive courts of their legitimate jurisdiction to exercise discretion to individualize an appropriate sentence to the relevant aspects of the character and record of each accused person. This Court in **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri – v- R**, **Kisumu Criminal Appeal No. 93 of 2014** followed the Supreme Court decision and held that minimum mandatory sentences are unconstitutional.

23. In the instant matter, we are satisfied that the sentence meted upon the appellant by the trial court and affirmed by the High Court was the mandatory minimum sentence as provided in **Section 8 (3) of the Sexual Offences Act**. The discretion of the two courts below to mete out a sentence to the appellant that is commensurate with the circumstances of the instant case was curtailed by the minimum mandatory sentence. Noting that on record there is mitigation by the appellant, we apply the Supreme Court dicta in **Francis Karioko Muruatetu & another (supra)** and find it appropriate to interfere with the sentence meted upon the appellant. Accordingly, we hereby set aside the twenty (20) years sentence and substitute the same with imprisonment for a term of fifteen (15) years with effect from 11th January 2012 when the trial court passed the sentence.

Dated at Kisumu this 31st day of July, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR