



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, M'INOTI & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 123 of 2015

JACKTONE OTIENO ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya

at Homa Bay (Majanja J.) delivered on 31st July 2015

in

H C Cr. Appeal No. 38 of 2014)

JUDGMENT OF THE COURT

1. Jacktone Otieno Onyango, the appellant, was charged with defilement contrary to **Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act**. The particulars are that on the 29th day of December 2011 at [particulars withheld] North Sub-location in Mfangano North Location within Homa Bay County, he intentionally caused his penis to penetrate the vagina of LAO a child aged 11 years. The appellant faced an alternative count of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act**.
2. On 30th December 2011, the appellant was arraigned before the trial magistrate for the taking of plea. The record shows that the charge was read to the appellant in Dholuo language and he stated that he understood the charge. Responding to the charge as read, the appellant replied *“It is true. I picked mangoes for her, she ate and after that I had sex with her as she agreed to do anything for me after eating the mangoes.”* The trial magistrate entered a plea of guilty.
3. After the plea of guilty was entered, the prosecution read the facts of the charge. Once again, the appellant replied that the *“Facts are true.”* The trial magistrate convicted the appellant on his own plea of guilty. The prosecutor urged the trial court to treat the appellant as a first offender. In his mitigation, the appellant prayed for forgiveness. The trial magistrate sentenced him to life imprisonment, stating as follows: *“He has admitted the offence but the statute has fettered the court’s discretion in sentencing the accused. I therefore give the accused the minimum sentence under statute. I sentence the accused to serve life imprisonment.”*
4. Aggrieved by the conviction and sentence meted out to him, the appellant lodged a first appeal to the High Court. The appeal was dismissed. In dismissing the appeal, the learned judge held that he was satisfied the appellant’s plea of guilty was unequivocal. The judge affirmed and upheld the conviction and sentence.
5. Further aggrieved, the appellant has lodged the instant second appeal to this Court citing the following grounds:
 - (i) The two courts below failed to appreciate that the ingredients of the charge were not explained to the appellant and hence he did not unequivocally plead to the same.
 - (ii) That the two courts below failed to appreciate that the appellant was compelled to make a plea of guilty.
 - (iii) The two courts below failed to observe that the appellant was subjected to physical torture to admit culpability.

(iv) The two courts below failed to observe that the charge was not interpreted to the appellant in a language that he understood well.

(v) The trial court failed to establish whether the appellant understood the consequences of pleading guilty to the offence.

(vi) The trial court failed to accord the appellant an opportunity to respond to the facts of the case as were read by the prosecution.

6. At the hearing of the instant appeal, the appellant appeared in person. The State was represented by the Principal Prosecution Counsel, Mr. L.K. Sirtuy. The appellant filed written submission and made oral highlight. The respondent made oral submissions in the appeal.

APPELLANT'S SUBMISSIONS

7. The appellant made his oral submissions in Dholuo language which was interpreted to the Court. In his submissions, the appellant urged that the plea of guilty was equivocal. He pleaded guilty because he had been threatened with death if he did not do so. He was sentenced to a term of life imprisonment which is harsh and excessive. He relies on the grounds of appeal filed in this matter.

8. In his written submissions, the appellant stated he only agreed to the fact that he had penetrative sex with the complainant on consensual terms but not to the other details such as the age of the complainant which is important. The appellant contends that the victim was above 18 years of age. The trial court did not exercise its jurisdiction of seeing and hearing from the witnesses to assess the age of the complainant through physical examination since she did not appear before court.

9. On the issue of interpretation in Dholuo language, the appellant submitted that there is no evidence on record to show that the interpretation was made faithfully and accurately. The appellant cited the decision in **Republic – v- Abdi Ali (1991) KLR 171** where it was held that a plea taken through an unsworn interpreter cannot be regarded as unequivocal. That the oath of the interpreter must be reflected on the record which was not done in this case.

RESPONDENT'S SUBMISSIONS

10. The respondent in opposing the appeal submitted that this is a second appeal which is confined to matters of law. The appellant unequivocally pleaded guilty to the offence as charged. The court proceedings were conducted in Dholuo language which the appellant stated he understood. That the particulars and facts of the case were read to the appellant and he pleaded guilty. It was submitted that this Court has no jurisdiction in a second appeal to consider matters of fact. Sentence is question of fact. The appellant was given opportunity to respond to the facts and particulars of the offence and he admitted the facts to be true. In concluding its submissions, the State urged us not to interfere with the conviction and sentence meted out to the appellant.

ANALYSIS and DETERMINATION

11. This is a second appeal which must be confined to matters of law. We have considered the submissions by all parties in this matter. The principal ground urged in this appeal is the appellant's contestation that his plea of guilty was equivocal and therefore the trial magistrate erred in entering a plea of guilty and the learned judge erred in upholding the conviction.

12. It is our duty to examine and determine whether the plea of guilty by the appellant was unequivocal and if the two courts below were correct in entering and upholding the plea of guilty. The procedure and guideline for plea taking is well articulated in the case of **Adan – v - 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.”

13. In **Obedi Kilonzo Kevevo - v - Republic [2015]** 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 as the facts as narrated by the

prosecution must each disclose an offence. Otherwise, the plea is not unequivocal.

14. 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.
15. 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 30th December 2011 when plea was taken, after the charge was read to the appellant, he pleaded “*It is true. I picked mangoes for her, she ate and after that I had sex with her as she agreed to do anything for me after eating the mangoes.*” The prosecutor then read the particulars of the charge. The appellant replied and stated “*The facts are true.*”
16. The record shows that in the plea taking, the trial magistrate recorded the accused’s own words. The record further shows that after plea was taken, the prosecutor immediately stated the facts and the appellant was given an opportunity to dispute or explain the facts or to add any relevant facts. The record shows that the appellant admitted the facts as read to be true. He neither raised any question as to his guilt nor did he challenge the accuracy of the facts as read and stated by the prosecution.
17. 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: “*The facts are true.*” The appellant did not change his plea and neither did he dispute the facts.
18. In this appeal, the appellant contends the plea was taken in a language he did not understand well. In **Jackson Leskei - v - Republic [2006] eKLR**, it was held it is the Court’s duty to ensure that the accused’s right to interpretation is safeguarded and to demonstratively show its protection. This Court has held that it is a fundamental right of an accused charged with a criminal offence to have the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands: (See **Diba Wako Kiyato – v – Republic, Criminal Appeal No 100 of 1985**).
19. In **Jackson Leskei - v - Republic [2006] eKLR**, this Court expressed itself as follows:

In the matter before us, while, by inference, we think that the appellant was possibly allowed the services of an interpreter, in absence of a note to that effect, we entertain a doubt that that was so. It is a matter which has caused us much anxiety more so considering that the appellant has a sentence of death hanging over his head. This and several other cases we have handled before, show the grave danger inherent in the failure by the trial court to record the essential details in proceedings before it, for instance, the name of the officer trying the case; the prosecutor and his rank; the court interpreter or clerk and the language or languages of the proceedings; the language used by each witness; that judgment was pronounced; the date thereof and in whose presence, et cetera. These are as important as the evidence and form part of the fair process of justice, the omission of which might affect an otherwise sound conviction.
20. In the instant matter, the record also shows the appellant took his plea in Dholuo language and he stated he understood the charge and particulars as read. The trial magistrate specifically record that the charge was read to the appellant in Dholuo language. From the foregoing, we are satisfied that the appellant’s plea of guilty was unequivocal. We are also satisfied that the plea was taken in a language that was well understood by the appellant.
21. In the instant matter, the appellant contends that he was compelled to make a plea of guilty. The issue of being beaten and compulsion to make a plea of guilty was never raised before the trial court. Whereas the issue was raised before the first appellate court, the learned judge considered and dismissed the same. This being a second appeal, we find there is no evidence on record (apart from the submissions by the appellant) proving compulsion to make a plea of guilty. Having pleaded guilty, the prosecution was not obliged to call any witnesses to prove the ingredients of the offence of defilement as charged. The contestation that the age of the victim was not established has no merit as the plea of guilty and admission of the facts and particulars of the offence obviated the duty of the prosecution to call any witness.
22. We now consider the constitutionality and legality of the sentence meted out on the appellant. The appellant was sentenced to life imprisonment. We recognize that the sentence was meted pursuant to **Section 8 (2) of the Sexual Offences Act** which imposes the minimum sentence of life imprisonment when the victim of defilement is a child below the age of eleven years. Both the trial magistrate and the learned judge adhered to the said provision.
23. 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.
24. In the instant matter, we are satisfied that the life 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 (2) 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 – v - Republic [2017] eKLR** and find it appropriate to interfere with the sentence meted upon the appellant. Accordingly, we hereby set aside the sentence of life imprisonment and substitute the same with imprisonment for a term of fifteen (15) years with effect from 30th December 2011 when the trial court passed the sentence.
25. The upshot is that we affirm and uphold the conviction of the appellant. We set aside the life sentence meted upon the appellant and substitute the same with imprisonment for a period of fifteen (15) years with effect from 30th December 2011.

Dated and delivered at Kisumu this 7th day of October, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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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