



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)

CRIMINAL APPEAL NO. 52 OF 2014

BETWEEN

KENNEDY OBOYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kakamega (Kimaru, J.) dated 20th September, 2012

in

H.C.C.R.A. NO. 211 OF 2010)

JUDGMENT OF THE COURT

1. **KENNEDY OBOYA** (the appellant) was, upon his own plea of guilty to a charge of defilement of a girl child contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act, convicted and sentenced to life imprisonment. His appeal to the High Court was dismissed thus provoking the present appeal.
2. In his memorandum of appeal, the appellant faults the learned Judge of the High Court for failing to note that his plea was not unequivocal; that contrary to **Article 50(2) (h)** of the Constitution he was not accorded a fair trial; and that the learned Judge failed to properly re-evaluate the evidence on record.
3. In respect of ground 1 Mr. Bw'Onchiri, learned counsel for the appellant, submitted that the appellant must have been tortured to plead guilty.
4. On ground two, counsel argued that the trial court should have advised the appellant that given the severity of the sentence for the offence of defilement of a child under the age of 11 years, the appellant was entitled to demand representation by counsel paid by the state otherwise there would be a miscarriage of justice. He cited **Article 50(2) (h)** of the Constitution in support of that argument.
5. On ground three, Mr. Bw'Onchiri submitted that had the learned Judge of the High Court properly re-evaluated the evidence on record, he would have noted that there was nothing on record to verify the

claim that the complainant was indeed 8 years old; that in the statement of facts the complainant's name was given as **B K** while in the charge sheet it was stated as **B K**; and that the doctor who examined the complainant soon after the alleged commission of the offence contradicted himself on the presence of spermatozoa in the complainant's vagina. At one stage the doctor said there was no spermatozoa in the complainant's vagina but later said he noted some.

6. Opposing the appeal, Mr. Sirtuy, learned Principal Prosecution Counsel for the State, submitted that this being a second appeal this Court has no jurisdiction to consider matters of facts including the severity of sentence. He therefore urged us to dismiss the appeal in its entirety.

7. We have considered the appeal. As Mr. Sirtuy quite correctly submitted this being a second appeal, this Court has no jurisdiction to entertain issues of fact including the severity of sentence. **Section 361** of the Criminal Procedure Code makes that quite clear. Having perused the record we are satisfied that the learned Judge of the High Court, pursuant to the obligation cast on his shoulders by the Principles enunciated by the predecessor of this Court in the case of **Okeno v. Republic [1972] EA 32**, thoroughly re-evaluated the evidence on record.

Having done so and come to the same conclusion as the trial court, this Court has loyalty to accept those findings. In **Stephen M'Irungi & Another v Republic [1982-88] 1 KAR 360**, the late Justice Chesoni stated this point thus:

"Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

8. We cannot therefore go into the issue raised by counsel for the appellant as to whether or not the complainant was 8 years old. At any rate the appellant having pleaded guilty to the charge, which clearly stated that the complainant was 8 years old, the prosecution was not obliged to produce evidence to prove a fact that had been admitted.

9. As regards the alleged contravention of the appellant's right to a fair trial under Article 50(2) (h), there is no obligation on the state to provide counsel to defend suspects charged with defilement. The learned Judge cannot therefore be faulted for failing to advise the appellant that he was required to demand representation by counsel paid by the state.

10. For these reasons we find no merit in this appeal and we accordingly dismiss it in its entirety. It is so ordered.

DATED and delivered at Kisumu this 5th day of February 2015.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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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