IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & MURGOR JJ.A)

CRIMINAL APPEAL NO. 369 OF 2011

BETWEEN

E L…...…………......…………..APPELLANT

AND

REPUBLIC …….….………. RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kitale (Muketi, J.) dated 20th December, 2011

in

H.C.CR.A. No. 65 OF 2010)

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JUDGMENT OF THE COURT

1. The gravamen of this appeal is whether or not the appellant's plea of guilty upon which he was convicted and sentenced to 30 years' imprisonment was unequivocal.

2. The appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act. It was alleged that during the night of 30th/31st May 2010, at [particulars withheld] Camp in the then Turkana District of Rift Valley Province, the appellant intentionally and unlawfully committed an act which caused penetration into the genital organ of N.R.W, a girl aged 14 years old.

3. Upon his own plea of guilty, the appellant was convicted and sentenced to 30 years' imprisonment. His appeal to the High Court was dismissed. He has now come to this Court on a second appeal. By dint of **Section 361** of the Criminal Procedure Code, a second appellate court's jurisdiction is limited to consideration of only points of law. What points of law then are raised in this appeal?

4. The main grievances in the appellant's nine grounds of his memorandum of appeal before this Court is that the learned Judge of the first appellate court erred in failing to appreciate that the charge was defective; that the appellant had not unequivocally pleaded guilty to the charge; and that the appellant was a minor. Those are obviously points of law, which this Court has jurisdiction to consider.

5. Presenting the appeal before us, Ms Kosgei, learned counsel for the appellant, submitted that the appellant's purported plea of guilty was not unequivocal. She argued that the appellant was never warned of the dire consequences of his plea of guilty; that contrary to the established procedure, mid-stream in the statement of the facts, there was an adjournment to enable the prosecutor obtain the P3 form but when the court resumed, the plea was not taken afresh as required; that the appellant's plea in mitigation negated the charge and a plea of not guilty should have been entered; that in the absence of spermatozoa in the complainant's vagina, there was no proof of penetration; that the charge was defective in that although the complainant in this case was 14 years old, **Section 8(2)** cited in the charge sheet relates to victims who are 11 years and below; and lastly, that the learned Judge erred in failing to appreciate that the appellant was a minor.

6. In response, Mr. Mulati, learned Principal Prosecution Counsel, submitted that throughout the proceedings, the appellant spoke in English. He cannot therefore be heard to now claim that he did not understand the charge. He attributed the insertion of **Section 8(2)** in the charge sheet instead of **Section 8(3)** to a typographical error and urged us to ignore it. Lastly, counsel dismissed the appellant's claim that he was a minor as there is nothing on record to prove that.

7. We agree with counsel for the appellant that the charge was defective. The complainant having been 14 years old, the correct sub-section relating to sentence in such case was sub-section (3) of Section 8. However, that defect did not occasion the appellant any prejudice because the sentence meted out to him was legal. The defect was therefore curable under **Section 382** of the Criminal Procedure Code.

8. As this Court stated in the case of **Joseph Marangu Njau v. Republic [2015] eKLR**, an accused person can change his mind, as he is entitled to, in the course of the period of adjournment between the time he pleads and when the statement of facts is made or completed. In such case, after adjournment, the court is supposed to take the plea afresh.

9. That did not happen in this case. Instead, the record in this appeal shows that mid-stream in the statement of the facts, the court granted the prosecutor's application for adjournment to enable him obtain the P3 form but when the court resumed, the plea was not taken afresh. That was irregular.

10. We also agree with counsel for the appellant that the appellant's plea in mitigation negated the plea of guilty. The record shows that after the facts were stated, the appellant replied:

> ***The girl is a girl friend. The girl is in school. I am also in school. The girl is mine. We have known each other for two months….***

11. This implies that as far as the appellant was concerned, there was nothing wrong in what he did since the complainant was his girl friend. In the circumstances, the court should have entered a plea of not guilty and proceeded to hear the case or adjourned it for hearing on a later date.

12. The appellant's age was stated in the charge sheet as 18 years. No birth certificate or age assessment report was produced. There is nothing on the record to show that the court enquired into the appellant's age. In his statement of facts, the prosecutor told the court that the appellant was found with a wallet which had a Youth Association Membership card. In the circumstances, he may very well have been 17 years as his counsel stated from the bar.

13. For these reasons, we find doubts in the prosecution case, the benefit of which should have been given to the appellant. Consequently, we allow this appeal, quash the conviction and set aside the sentence imposed upon the appellant. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this10th day of December, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

…...........................

JUDGE OF APPEAL

A. K. MURGOR

…...........................

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR