



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MARAGA, OUKO & MOHAMMED, J.J.A)**

**CRIMINAL APPEAL NO. 696 OF 2010**

**BETWEEN**

**BONFACE NGEIYWO SAMTOM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Bungoma (Mr. F. N. Muchemi J)  
dated 23<sup>rd</sup> June 2010*

in

**HC. CRA NO. 11 OF 2010)**

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**JUDGMENT OF THE COURT**

Upon pleading guilty to a charge of defilement of a child aged 5 years, the appellant was sentenced by the learned trial magistrate (*J.O. Magori, RM*) to 30 years imprisonment. The appellant's first appeal to the High Court at Bungoma was dismissed. In dismissing that appeal, the learned Judge (*Muchemi J*), held that the sentence of 30 years was illegal as **Section 8 (2)** of the **Sexual Offences Act** provides for a life imprisonment where, as in the case before her, the victim was 11 years or less. The learned Judge consequently enhanced the sentence to life imprisonment.

Aggrieved by this turn of events, the appellant now brings this second appeal on the following condensed grounds;

- (i) that the appellant, a Saboat by tribe did not understand the English and Kiswahili languages used when the plea was taken,
- (ii) that the trial court failed to warn the appellant of the consequences of pleading guilty to the offence charged.
- (iii) that the judgment of the High Court was not signed and dated. This ground was dropped after it emerged that it was indeed signed,

(iv) that the learned judge of the High Court erred in his interpretation of **Section 8(2)** of the Sexual Offences Act by enhancing the sentence without seeking the appellant's comments, and

(v) that the learned judge was biased.

The appeal was opposed by the learned counsel for the respondent who urged us not to interfere with the decision of the High Court as no grounds to warrant that have been advanced. This being the second appeal, it must be considered within the confines of **Section 361** of the Criminal Procedure Code which provides in clear terms that:-

**“361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-**

**(a) on a matter of fact, and severity of sentence is a matter of fact; or.....”**

The court is bound by the concurrent findings of fact made by the two courts below and will not interfere with those findings unless they are based on no evidence at all or on a perversion of the evidence or considering the evidence as a whole no reasonable tribunal properly directing itself to the evidence could make such findings. See **Sammy Kanyi Mwangi V. Republic** Criminal Appeal No. 60 of 2006.

Again, as a general rule and by dint of **Section 348** of the Criminal Procedure Code,

**“348. 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.”**

It has, however, been held that the above provision is not an absolute bar to an appeal against a conviction based on a guilty plea as there may very well be sufficient cause to find that the plea was not unequivocal. See **Ndede V. R** [1991] KLR 567.

Only the legality as opposed to extent (severity) of sentence, for the purpose of appeals to this Court, constitute a matter of law. We have already stated earlier, and it bears repeating that the appellant's contention, from the condensed grounds of appeal, is that the plea was not unequivocal for the reason that the appellant did not understand the language used; that the trial court failed to warn the appellant of the consequences of pleading guilty to such a serious offence; and that the learned Judge fell into error by enhancing the sentence of 30 years imposed by the trial magistrate to life sentence.

On the language, it is clear to us from the record, that there was interpretation from English to Kiswahili languages. It is clearly recorded that he appellant understood Kiswahili, and we entertain no doubt that he did.

At no time did he complain that he had difficulties following proceedings. Indeed, he pleaded guilty when the main charge was read over to him. Likewise, when the facts were outlined he confirmed that they were correct. Finally, in his mitigation, he explained how in the course of his arrest he lost his bicycle and expressed the fear that should he be jailed, his *shamba* would be untended.

Learned counsel for the appellant cited no authority to us in support of his submissions that the trial Court ought to have warned the appellant of the consequences of pleading guilty to a charge of defilement of a 5-year-old girl. We are also not aware of any such authority. The only instance where such a warning is required is where the offence is one punishable by death. This requirement was set out way back in 1946 in **Changuony Arap Kisang V. R**. Criminal Appeal No. 148 of 1946. That ground must, in the circumstances, also fail.

Finally, on the sentence, **Section 8 (2)** of the Sexual Offences Act, under which the appellant was charged provides as follows:

**“8. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”** (Emphasis supplied).

From the plain reading of **Sections 8 (2), 8 (3) and 8 (4)** of the Act, the sentence provided for a person who commits defilement with a child aged 11 years and below is life imprisonment. While defilement of a child between the ages of 12 and 15 years will attract, upon conviction a term of imprisonment of not less than 20 years. On the other hand, under **Section 8 (4)** a sentence of not less than 15 years will be imposed for defilement of a child between the ages of 16 and 18 years. Clearly, from this the Court only has discretion on sentence where the offence of defilement is committed against a child above the age of 11 years. And even then the sentence cannot be below either 15 or 20 years. But once there is proof that a child is 11 years and below the sentence of life imprisonment is mandatory.

In a similar case where a child aged 5 years was defiled and upon conviction the trial court sentenced the appellant to 50 years imprisonment, on appeal, this Court (Omolo, Bosire and Onyango Otieno JJ.A) held that:-

**“As the law stands, Section 8 (2) (supra) does not allow for substitution of a definite period of imprisonment. It provides for life imprisonment and no more, no less. If the Legislature had intended to allow for any discretionary term, it would have proceeded the way it did in Section 8 (3) and 8 (4) (supra) of the Act. Thus the answer to the second question as to whether the action of the learned trial Magistrate in substituting a definite term of imprisonment namely 50 years imprisonment in place of life imprisonment provided in Section 8 (2) (supra) is a matter of law or of fact, is in our view not in dispute. It is a matter of law, as the sentence that was awarded is not lawful sentence provided ..... The issue of sentence in this case is a matter of law as it is the issue as to whether the sentence meted out to the appellant is lawful or not. It is not a question of severity of sentence. It is whether a lawful sentence was awarded. We have jurisdiction to interfere. As we have stated above, the law as it stands is that life imprisonment is the only sentence provided for the offence that the appellant was charged with and is a mandatory sentence. The sentence of 50 years awarded by the trial court was unlawful and was not interfered with by the first appellate court as it should have done. We have no alternative but to put right the position. The appeal is dismissed. Sentence of 50 years imprisonment is set aside and in its place, the appellant will serve life imprisonment.”**

See also **Joseph Kiplimo V. Republic** Criminal Appeal No. 416 of 2010.

In this case, the first appellate court made the correct decision by setting aside the unlawful sentence of 50 years imposed by the trial court and substituting it with that lawfully provided for by statute, life imprisonment. We have therefore no legal basis for interfering with that decision.

In the result, this appeal fails and is hereby dismissed in its entirety.

**Dated at Eldoret 17<sup>th</sup> this day of October 2013.**

**D. MARAGA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true Copy of the original.*

**DEPUTY REGISTRAR**

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