



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 117 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 5 of 2015

by the Senior Principal Magistrate's Court at Mumias)

PATRICK MATEBA JEREMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon TA Odera, Senior Principal Magistrate, on two counts of defilement contrary to section 8(1)(3) of the Sexual Offences Act, No. 3 of 2006, and was accordingly sentenced to serve twenty (20) years imprisonment on each count, to run concurrently. The particulars of the two counts charged that the appellant on the nights 16th October 2015 and 5th December 2015 at [particulars withheld] Village, Eshikalame Location, Mumias Sub-County of Kakamega County he intentionally caused his penis to penetrate the vagina of AW a child aged fourteen years.

2. He had also faced alternative charges of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the alternative charges were that on the same dates and at the same place stated in the main count, he had intentionally caused his penis to come into contact with the vagina of AW.

3. The appellant pleaded guilty to the two main charges before the trial court, a plea of guilty was entered and he was sentenced on 17th December 2015 to serve the terms stated in paragraph 1 of this judgment.

4. He was dissatisfied with the conviction and sentence the appellant appealed to this court and raised several grounds of appeal. He averred that he pleaded guilty upon being coerced and intimidated by prosecution witnesses and especially the arresting officer. He further averred that the court did not warn him of the consequences of pleading not guilty neither was he informed of the penalty for the offence he faced. He also pleaded that the trial court did not give him an opportunity after he had pleaded guilty to recant or confirm his plea.

5. Being the first appellate court, I have re-evaluated all the record of the trial court. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the appellant as he testified. I am guided in that regard by the decision of the Court of Appeal in the case of *Okeno vs. Republic (1972) EA 32*.

6. The appeal was canvassed on 25th October, 2018. The appellant relied on his written submissions that had been filed in court on 14th June 2018. Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions. Neither of the two cited any statutory provisions nor any case law touching on the matters in controversy.

7. The appellant in his written submissions he submitted that the trial court had not taken into account the state of his mind at the time of entering the plea of guilty. He further submits that the trial court did not explain to him his constitutional rights. He states that the trial court did not inform him of the implications of leading guilty, neither had he been furnished with the prosecution evidence before the plea was taken. He submits that the pleading was not unequivocal.

8. Mr. Ng'etich made oral submissions. He stated that the appellant had been pleaded guilty after the charges had been read and explained to him in the Wang'a language. On his being intimidated by the state witnesses, he submitted that the witnesses had not been presented in court at the time of plea taking, and in any event the appellant had not explained how he was coerced or intimidated.

9. The law that guides the taking of plea by a trial court are set out in section 207 of the Criminal Procedure Code, Cap 75, Laws of Kenya.

The said provision states as follows –

‘(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;

Provided that after conviction and before passing sentence or making an order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.’

10. The Court of Appeal in *Adan vs. Republic* (1973) EA 445, explained the application of section 207 of the CPC in cases where an accused pleads not guilty. The court said –

‘When a person is charged and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak or understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or assert additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to ‘not guilty’ and proceed to hold a trial. If the accused does not deny the facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.’

11. The trial record of 17th December 2015 when the plea was read says as follows-

‘Coram

Magistrate: TA Odera SPM

Prosecutor: Kerubo

Court Clerk: Polycarp

Interpretation: English/Wanga

Accused present/Absent presented in person

James Mwinami clerk Butere court. Wanga interpreter present

The substance of the charges and every element thereof has been stated by the court to the accused person, in the language he/she understands, who being asked whether he/she admit or denies the truth of the charges replies:

Count 1

It is true I committed the offence and defilement

Count 2

It is true I committed the offence and defilement

Court

Plea of guilty in both counts’

Before the particulars of the charges were read over and explained, the court placed the file aside for the prosecution to study them afresh given that it was alleged that the complainant and the accused were related. The matter was called out later after it was established that the two were not related, the particulars were read out to the appellant, after which the court recorded –

‘Accused: The facts are true.

Court: Accused is convicted on both count I and Count II on his own plea.

Prosecution:

We do not have his previous records. May he be treated as first offender.

Accused: I seek leniency. I have children. I seek the forgiveness of this court. ‘

The appellant was thereafter sentenced.

12. The Court of Appeal in *Elijah Njihia Wakianda vs. Republic Nakuru Criminal Appeal Number No. 73 of 2016*, had to deal with a record in respect of plea which read as follows:

‘Court: the substance of the charge(s) and every element thereof has been stated by the court to the accused person in a language he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili: - it is true.’

With respect to that record, the court said –

‘With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of ‘charges(s) when there was a single charge and the rather odd ‘in a language he understands,’ when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one is guilty and leads to conviction.

We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specially asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language.

... We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare.

... The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process.’

13. Going by the provisions and case law cited above, there can be no doubt that the plea taking process in the instant matter was ambiguous. It was not clear whether the appellant was present or absent. It was also not clear whether the accused person was male or female. The appellant’s response, ‘It is true I committed the offence and defilement did not help either. One cannot decipher exactly what the appellant meant by that. There is also the issue of the severity of the sentence for the offence that he faced. The Court of Appeal in *Elijah Njihia Wakianda vs. Republic* has stated that the court taking plea must go the extra mile, of explaining to the accused person the consequences of being convicted of such an offence. The court equated the responsibility of the court in such circumstances to that of an educator. The record before me indicates that the court did not play that role.

14. In view of what I have stated above, I hereby declare that the trial of the appellant, for trial begins when an accused person is called upon to take plea, was a mistrial. I shall accordingly quash the conviction and set aside the sentence imposed by the trial court. The offence charged was a serious one. In the interests of justice, I shall direct that the appellant be charged and tried afresh before a magistrate of competent jurisdiction. I direct that the trial court file be returned to the Senior Principal Magistrate’s Court at Mumias for the appellant’s retrial by a magistrate other than Hon TA Odera, SPM. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10th DAY OF April, 2019

W MUSYOKA

JUDGE