



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 80 OF 2017

(Being an appeal from the original judgement and

sentence in criminal case No. 13 of 2017 dated

13/3/2017 in the Chief Magistrate's court at

Narok, R. v. Jonathan Tepela Nkurumwa)

JONATHAN TEPELA NKURUMWA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of defilement, which is contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006.

2. The state has supported both the conviction and sentence.

3. The appellant was convicted on his own plea of guilty and sentenced to life imprisonment. In this court, the appellant has raised 8 grounds of appeal which his counsel has reduced to three grounds. In ground 1, he has stated the unchallengeable fact that he did not plead guilty. In ground 2, he has faulted the trial court for convicting him on his own plea of guilty which was equivocal and was not according to law. In this regard, counsel for the appellant has submitted that in taking the plea, the trial court used a language which the appellant was not conversant with. The record of the trial court shows that the languages used were English and Swahili. The language used by the appellant is not shown, since the record does not show his language of choice. It is difficult for this court to know whether he fully understood the elements of the offence with which he was charged. In this regard, counsel for the appellant cited the decision of the Court of Appeal in *Elijah Njihia Wakianda v. R (2016) eKLR*. In that case, the Court of Appeal allowed the appellant's appeal on the basis that the specific language used by the appellant was not indicated. Again in that case which is on all fours with the instant appeal, the court expressed itself in the following terms: ***"Court: The substance of the charge(s) and every element thereof has been stated by the court to the accused in a language that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili: - "It is true." 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 charge(s) when there was a single charge and 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 of guilty and lead 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 specifically 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.

*We are not satisfied that the appellant herein, to use the phraseology of **LUSITI vs. REPUBLIC** (supra) “wished to admit without any qualification each and every essential ingredient of the charge”. The fact that he had a history of psychiatric challenges only goes to add to the possibility of equivocation but we shall not explore the issue further in view of what we shall shortly state.*

Where, as here, a plea of guilty is not unequivocal, the ensuing conviction and sentence cannot be allowed to stand. We consider the plea-taking to have been a nullity. Accordingly we quash the conviction and set aside the sentence. We set the clock back so the process is restarted on proper footing. In consequences, we direct that the appellant shall be presented before the Principal Magistrate’s court at Nyahururu within fourteen days of the date hereof for the purpose of taking a fresh plea to the charge.”

4. Furthermore, the court in that case ruled that the sentence to be imposed upon an appellant who is pleading guilty should be brought to his attention, especially where the sentence that is to be imposed is a severe and mandatory sentence. In the instant appeal, the appellant was sentenced to life imprisonment. This was a severe and mandatory sentence. In the circumstances, I find that the trial court failed in bringing to the attention of the appellant that he was liable to be sentenced to life imprisonment. This ground of appeal succeeds and I hereby uphold it.

5. In ground 3, the appellant has faulted the trial court for convicting him on medical evidence that was not proved in court. Counsel for the appellant has submitted that the doctor who prepared the medical report commonly known as the P3 form should have been called to testify in court. I find that from the statement of facts which were presented by the prosecutor in the following terms: “*She was taken to hospital. PCR form and P3 - form P.exh 1 and 2. She had bled profusely from vaginal wall and her hymen was perforated. Clinic card shows she was 7 – P. exh 3. Accused was arrested at Olposmuru centre and charged. That is all.*”

In the light of the foregoing statement of facts, I find that it was not necessary to summon the doctor to testify in court. This was more so since the appellant had pleaded guilty to the charge of defilement. I therefore find not merit in this ground of appeal and I hereby dismiss it.

6. In ground 4, the appellant has faulted the trial court in law for denying him the opportunity to mitigate before being sentenced. In this regard, the trial court expressed itself in the following terms: “*Court - Indeed no mitigation can change the outcome the sentence is mandatory. Accused is sentenced to life imprisonment. Right of appeal explained.*”

It is clear from the foregoing that the court did not accord the appellant an opportunity to mitigate. Mitigation is a fundamental right of an accused person, even where the sentence to be imposed is mandatory. Additionally, mitigating factors are also useful in matters of pardon and clemency, that take place after an appellant has exhausted his judicial remedies in terms of article 133 (1) and (2) of the 2010

Constitution of Kenya. An accused should always be allowed to mitigate before being sentenced. In the circumstances, I find that this ground of appeal succeeds and I hereby uphold it.

7. The appellant in 8 ground has urged the court to order for a retrial in view of the fact that he did not have a satisfactory trial. I find that the sentence to be imposed was not brought to his attention as required by law before he was sentenced. I also find that the language he used is not indicated as required by law. In this regard, I find the authority cited by the state namely *John Muenda Musau v. R (2013) eKlr* is distinguishable from the instant appeal. In that case, the language used by the appellant namely Kikamba was indicated, which is not the case in the instant appeal.

8. The upshot of the foregoing is that the appellant's appeal has succeeded. I therefore allow his appeal with the result that his conviction and sentence are hereby quashed. I hereby order for the re-trial of the appellant in the Chief Magistrate's court by a different magistrate other than the one who convicted him. The appellant is to be presented before the Chief Magistrate's court at Narok within 2 weeks of the date of this judgement for purposes of taking his plea.

Judgement delivered in open court this 29th day of January, 2018 in the presence of Mr. Kilele holding brief for Ms Maritim for the appellant and Mr. Mukofu for the respondent.

J. M. Bwonwonga

Judge

29/01/2018