



REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL NO. 108 OF 2016
(CORAM: D. S. MAJANJA J.)

BETWEEN
DUNCAN OTIENO ODUOR..... APPELLANT
AND
REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence dated 29th August 2016 in Criminal Case No. 540 of 2016 at Ukwala Law Courts before Hon. G.Adhiambo, SRM)

JUDGMENT

1. The appellant, **DUNCAN OTIENO ODUOR**, was charged with the offence of attempted defilement contrary to **section 9(1) and (2)** of the *Sexual Offences Act*. The particulars of the offence were that on 26th August 2016 at around 1300 Hrs in [particulars withheld] Sub-location, Ugunja District within Siaya County, he intentionally attempted to cause his penis to penetrate the vagina of YAO, a child aged 10 years. The appellant pleaded and was convicted and sentenced to 10 years' imprisonment.
2. He now appeals against conviction and sentence. In his petition of appeal, the appellant stated that he pleaded guilty because of confusion and without knowing the consequences of his plea. That he was not allowed to change the plea. In his submissions before the court, she stated that she was beaten by the police and threatened to plead guilty.
3. The respondent supported the conviction and contended that the plea was unequivocal and the sentence was legal.
4. The requirements of recording a guilty plea provided for under **section 207** of the *Criminal Procedure Code (Chapter 75 Laws of Kenya)* were elucidated in *Adan v Republic* [1973] EA 445 as follows: -
 - i. The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language he understands
 - ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
 - iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the fact or add any relevant facts.

iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered.

v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.

5. Further, the Court of Appeal in ***John Muendo Musau v Republic NRB CA No. 365 of 2011 [2013]eKLR*** added that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence.

6. I have reviewed the proceedings. The appellant was arraigned in court on 29th August 2016 and when the charge was read to him in *Dholuo* he accepted and answered that, *"It is true"*. The facts were then read to him. From the facts complainant's grandmother sent the complainant with the appellant, who was her servant, to the sugar cane farm. On reaching the sugar cane farm, the appellant grabbed the complainant's hand, covered her mouth, threw her on the ground and proceeded to undress her. He removed his penis and attempted to penetrate her. He told her not to tell anyone. The complainant did not tell her grandmother what happened and it is only when he noticed her walking in an unusual manner that she realized the child had been defiled. He called her mother and they took the child for examination and treatment at Ambira Sub-district hospital. The doctor who examined her did not find that the labia and hymen intact and though there was evidence of vulval friction but no signs of penetration. The P3 form and treatment notes were produced. The birth notification was also produced showing that the complainant was born on 15th January 2006.

7. After all the facts were read to the appellant he stated, *"It is true I tried to have sex with her. The facts are true."* On this basis, the appellant was convicted. In mitigation, He stated that, *"I do not have parents I request the court to forgive me. I will not repeat the offence."*

8. Having reviewed the proceedings, I find that the plea of guilty was unequivocal. The facts read to the appellant were detailed and disclosed the offence. He accepted the facts and upon conviction. He did not say anything in mitigation that suggested a change in plea. He, in fact, accepted that he committed the offence. There is no indication in the record the appellant requested to change his plea during the proceedings or disclosed to the court that he had been threatened or was in fear.

9. I affirm the conviction and sentence. The appeal is dismissed.

SIGNED IN NAIROBI

D. S. MAJANJA

JUDGE

DATED, SIGNED and DELIVERED at SIAYA this 19th day of February 2018

T. W. CHERERE

JUDGE

Appellant in Person

Ms Odumba, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State

Court Assistants: Laban O. Odhiambo, Ishmael Orwa