



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 73 OF 2016**

**STEPHEN GITHAIGA WACHIRA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 36 of 2016 (Hon. C.M. Mburu, RM) on 6<sup>th</sup> May, 2016)*

**JUDGMENT**

The appellant was charged and convicted on his own plea of guilty for the offence of attempted defilement contrary to **section 9(1)** as read with **section 9(2)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars were that on the 4<sup>th</sup> day of September, 2016 at around 1300 hours in Tetu District within Nyeri County, the appellant intentionally attempted to cause his penis to penetrate the vagina of AWW, a child of 12 years old. He also faced an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act** but having been convicted of the principal count, this alternative charge is of little consequence in the present appeal.

Upon his conviction, the appellant was sentenced to serve 10 years imprisonment.

Although he was convicted on his own plea of guilty and sentenced accordingly, the appellant still appealed against both the conviction and sentence. In his grounds of appeal, he faulted the learned trial magistrate for her failure to appreciate that the appellant had been plagued with a mental illness since his birth and therefore was unfit to plead and, in any event, he was incapable of appreciating the nature of his acts. For the same reason, he could not understand the consequences of pleading guilty to the charge. The decision to convict the appellant was also impeached because the learned magistrate is alleged to have erred in law and in fact because she failed to inquire from the accused person the language he understood.

In her submissions, Ms Mwikali for the appellant reiterated that the appellant is mentally unstable and therefore he cannot be taken to have understood the charge and the rest of the proceedings. Counsel urged further that it was incumbent upon the learned magistrate to have made an inquiry into the mental status of the appellant and in this regard, she cited **section 162** of the **Criminal Procedure Code, cap 75**. She also relied on the decision in Nairobi **High Court Criminal Appeal No. 12 of 2015, Abdullahi Farah Ibrahim versus Republic** where the Court (Ngenye, J.) overturned the magistrate's decision to convict the appellant because she found as a fact that the appellant was schizophrenic at the time he took plea. Counsel also relied on the Court of Appeal decision in **Criminal Appeal No. 73 of 2016 (Nakuru), Elijah Njihia Wakianda versus Republic** where Waki, Nambuye and Kiage, JJA., were confronted with questions similar to those raised in the present appeal; that the appellant, though assessed to have been of sound mind and fit to plead, he had previously been admitted at a psychiatric unit because of what was regarded as 'substance induced psychosis'; and, that the plea was not unequivocal as the language used in taking of the plea was not that certain. The Court of Appeal found the latter to have been the case and allowed the appeal and remitted the case back to the trial court for a retrial.

Mr Muranga for the state opposed the appeal and urged that it was apparent from the record that the plea was unequivocal. While apparently making reference to **section 11** of the **Penal Code, cap. 63**, counsel urged that the court was right to presume that the appellant was of sound mind. That section provides that every person is presumed to be of sound mind, and to have been of sound mind at any time which comes into question, until the contrary is proved.

**Section 207** of the **Criminal Procedure Code** generally explains the procedure to be followed in taking pleas in criminal trials in the subordinate courts. It states as follows:

**207.(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 a 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.**

The application of these provisions where a plea of guilty is entered was explained in the case of **Adan versus Republic (1973) E.A.445**; in that case the Court of Appeal set out the procedure for taking plea where the accused pleads guilty. The court said at page 446:

**When a person is charged, the charge 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 and 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 asserts 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.**

This passage is largely self-explanatory and warrants no further elaboration. It is important, however, to note that the court went further to explain the importance of a statement of facts. In the court's opinion, the statement enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence; secondly, it gives the magistrate the basic material on which to assess the sentence to mete out. The court noted that it is not unusual that an accused person, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty; it is for this reason that it is essential that a statement of facts precedes the conviction.

As far as the appellant's plea is concerned the record shows that it is not completely free of ambiguity; this is what is recorded to have transpired when it was entered:

**6.9.2016**

***Coram:***

***Prosecutor***

***Court clerk***

***Interpretation-English/Swahili/Kikuyu***

***Accused-Present***

***The substance of the charge and every element thereof has been stated by the court to the accused, in the language that he/she understands, who being asked whether she admits or denies the truth of the charge(s) replies in Kiswahili.***

***Count 1:*** Ni kweli

***Court:*** Plea of guilty entered.

After the state counsel read the facts the proceedings went further as follows:

***Accused:*** the facts are true.

***Court:*** Accused convicted on plea.

***State Counsel:*** I do not have previous records. He can be treated as first offender.

***Accused in mitigation:*** I have nothing to say.

The appellant was then sentenced.

One major question that is bound to arise from this excerpt of the record is, which of the three languages indicated in the coram section of the proceedings of the 6<sup>th</sup> September, 2016 did the trial court employ in reading out the charge and the particulars to the appellant? Was it English translated to Swahili or Kikuyu or was it either of the two local languages translated to English? I am aware that the court language is either English or Swahili but as far as criminal procedure is concerned where an accused does not speak or understand any of those two languages then they must be translated to a language that he understands. And the record must bear it out in clear and unambiguous terms the language that he is comfortable with or the translation thereof more so when he pleads guilty to the charge against him. Certainly, this did not happen in the appellant's case. Looking at the record it is simply not possible to tell which of the three languages the appellant is alleged to

have 'understood'. It does not matter that his answer is indicated to have been given in Swahili; it does not always follow that going by the language he used in his answer to the charge, the charge and the particulars therefore must have been read in the same language.

This question was discussed by the Court of Appeal in the *Elijah Njihia Wakianda versus Republic* (supra) where the manner in which the plea was taken is many ways similar to the manner the appellant in the present appeal took his plea. In that case the record in respect of the plea is stated to have 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 that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili: - it is true.***

I can do no better than reproduce what the court had to say about this statement as I find it to be as much relevant to this appeal as it was in the appeal before the Court of Appeal. The learned judges said:

***With respect, we find this disturbing. It seems to us that this 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 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 of 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 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.***

The learned judges went further to emphasise the importance of explaining the severity of the sentence, where one has to be meted out, to the accused. They said thus:

***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.***

As to the responsibilities of the trial court at this stage of the proceedings, the learned judges reiterated that:

***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.***

Having come to the conclusion that the plea was ambiguous, the learned judges allowed the appeal and remitted the case back to the trial court for a trial. With this conclusion, it found it unnecessary to consider the other equally vital issue of whether the appellant was mentally fit to stand trial.

It should be obvious to anyone that the circumstances in the *Elijah Njihia Wakianda case* are strikingly similar to those in which the appellant in the present appeal found himself. The 'template' which the learned judges spoke about appears to be the same one employed here for the charge and every element thereof are said to have been 'stated to the accused in the language that he/she understands' without specifying which language it was and suggesting that the accused person could be of either gender when it is clear that the appellant was a male person. As in the Court of Appeal case, the appellant here is also said to have 'replied in Kiswahili.'

I am bound by this decision of the Court of Appeal; I am also happy to take cue from that Court will suit and avoid any discussion on the issue of the appellant's mental status at the time he took his plea. Having come to the conclusion that the plea was not unequivocal and therefore the appeal should be allowed, the question on the appellant's sanity is, no doubt, moot.

At the end of it all I would declare the appellant's trial a mistrial. His conviction is quashed and sentence set aside; however, rather than set him at liberty, I would, in the interest of justice, direct that the appellant be charged and tried afresh before a magistrate of competent jurisdiction. Accordingly, the deputy registrar is directed to return the original file together with a certified copy of this judgment to the Chief Magistrates' court at Nyeri for the appellant's retrial. The appellant's appeal succeeds to that extent only.

Meanwhile, to avoid the issue of the appellant's sanity cropping up again, I would direct the trial court to make the appropriate orders to ascertain the appellant's fitness to plead and stand trial before he takes a fresh plea. It is so ordered.

**Signed, dated and delivered in open court this 31<sup>st</sup> May, 2018**

**Ngaah Jairus**

**JUDGE**