REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 105 OF 2017

BETWEEN

ANDREW ATIBO MAKOKHA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against sentence imposed on 19.10.2017 in Kakamega CM's Court Criminal Case no. 61 of 2017(S.O) by Hon. B.S. Khapoya SRM)

J U D G M E N T

Background

1. On 19th October, 2017, the appellant herein Andrew Atibo Makokha pleaded guilty to the charge of rape contrary to section 3(1)(a) (b), (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 17th day of October, 2017 in Kakamega Central District within Kakamega County intentionally and unlawfully caused his penis to penetrate the vagina of M.A, without her consent.

2. In the alternative the appellant was charged with committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act, No. 3 of 2006, the particulars being that on 17th October, 2017 in Kakamega Central district within Kakamega County, he unlawfully and intentionally touched the vagina of M.A with his penis against her will.

The Facts

3. The facts as given by the prosecutor were that on the 17th October 2017 the complainant M.A left her home and indicated to her mother P.O that she intended to visit the appellant who was a bishop in their local church. The purpose of the visit was to seek spiritual healing and prayers. On arrival at the church, M.A found the appellant with other church members. M.A. remained behind with the appellant after other church members left. The appellant then instructed her to take off her pantie and to bend down. She had done so on two previous occasions. The appellant had told her that he was chasing away a bad omen.

4. As M.A bent down, she felt pain in her private parts and when she turned she saw the appellant's penis. The appellant hurriedly zipped up as M.A ran out of the church, screaming for help. Members of the public responded and apprehended the appellant. The appellant was subsequently charged with the present offence. The duly filled P3 form was produced in court as Pexhibit 1. The post rape form was produced as PExh 2. Upon conviction, the appellant was sentenced to serve 10 years in jail as by law provided.

The Appeal

5. Being aggrieved by the sentence, the appellant brought this appeal which is premised on the following homemade grounds:-

> 1. THAT the learned trial Magistrate grossly erred in law and fact by holding my plea of guilty as unequivocal without first inquiring into the state of my mind as at the time of pleading to the charges.
>
> 2. THAT the learned trial Magistrate grossly erred and/or misdirected himself in law and fact in failing to invoke provisions of Article 50(2)(g)(h) and (j) of the Constitution before passing sentence
>
> 3. THAT the learned trial Magistrate grossly, erred in law and fact in handling me a harsh sentence and further accepting my plea of

guilty without first warning me of the consequences of such a plea

4. THAT the learned trial Magistrate grossly erred in law and fact in failing to observe that the prosecution has not disclosed to me the true facts of the offence.

6. The appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

Duty of this Court

7. As this is a first appeal against both conviction and sentence, and since the conviction was based on a plea of guilty the duty of this court is to determine whether the plea of guilty entered by the trial court was unequivocal.

The Applicable Principles

8. The principles applicable in this area of the law have been well settled for a long time. In **Baya – vs – Republic [1984] KLR 657**, the court held that for a plea of guilty to be unequivocal, "the charge and all its essential ingredients must be explained to the accused in vernacular or some other language that he understands and the accused's own words in reply should be correctly translated into English and carefully recorded. In **Chege – vs – Republic [1983] KLR 425**, the court held that the record of the trial court taking the plea must show that the accused knew what he was committing to. It was further held that a plea of guilty must be taken cautiously and the record should clearly reveal that the facts were read to the accused and that the accused must be shown to have understood the facts and he knew what he was admitting to.

9. It was also held in **Onkoba -Vs- Republic [1989] KLR 395** that "it is very desirable that a trial judge on being offered a plea which he construes as a plea of guilty to a capital offence, should not only satisfy himself that the plea is an unequivocal plea, but should satisfy himself and record that the accused understands the elements which constitute the offence and understands that the penalty is death."

10. I entirely agree with the holdings in the above cases and add that even where the offence is not a capital offence, it is important for the trial court to make it clear to the accused what sentence he is likely to get on pleading guilty to the specific offence. The sentence in this case was a long sentence and I must now proceed to examine the record with a view to establishing whether the appellant understood the elements that constitute the offence of rape, and what the consequences of pleading guilty thereto were.

The submissions

11. Both parties made oral submissions in respect of this appeal. Counsel for the respondent conceded the appeal on grounds that the plea was not unequivocal. Counsel for the respondent urged the court to allow the appeal but remit the case for retrial.

Analysis and Determination

12. Upon a careful perusal of the record, and upon careful consideration of the submissions and in light of the principles stated above, I am satisfied that the plea in this case was not unequivocal., I note that though the appellant had stated that the facts were true, he stated the following in mitigation:-

"The girl was my friend, we used to have sexual intercourse. When I refused she went claiming I had raped her."

13. In my considered view and as rightly submitted by prosecution counsel what the appellant stated in mitigation did not support the plea of guilty, and at that point the trial court should have put the question to the appellant as to whether he intended to change his plea. This process was necessary because the appellant's statement in mitigation negated the allegation that he raped M.A without her consent. Secondly the appellant had clearly denied the charge by saying that he had refused to have intercourse with M.A on that particular day. The plea of guilty in this case cannot therefore stand.

14. In the circumstances, I allow the appeal quash the conviction and set aside the sentence.

Should there be a retrial

15. In **Fatehali Manji – vs – Republic [1966] EA 343**, the court held that "

(i) in general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

16. Applying the above principle to this case, I am satisfied that an order for retrial is merited. Such an order will not give the prosecution an opportunity to fill up any gaps in its case; nor can it be said that there is insufficiency of evidence. The only error committed by the trial court was entering a plea of guilty when it was clear that the appellant had retracted that plea.

Conclusion

17. In conclusion, I make the following orders:-

1. The appeal is allowed, conviction quashed and the sentence of 10 years is set aside

2. The case is remitted for fresh trial, to the Chief Magistrate's court at Kakamega

3. The trial shall be conducted by a magistrate other than Hon. B.S. Khapoya SRM who took the plea.

4. The appellant shall remain in custody pending his appearance before the CM Kakamega on Thursday 24th May, 2018

Orders accordingly

Judgment delivered, dated and signed in open court his 21st day of May 2018

RUTH N. SITATI

JUDGE

In the presence of:-

Mr. Elungata for Momanyi (present) for Appellant

Mr. Ngetich (present) for Respondent

Polycap Mukabwa Court Assistant