REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 3 OF 2017

JOSEPH KITAVI NZIOKI.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

Being an Appeal from the conviction and sentence of **Hon. G. O. Shikwe (Senior Resident Magistrate) in Kithimani Principal Magistrate's Court Criminal Case number 1 of 2017 (S.O.)** on 3rd January, 2017)

JUDGEMENT

1. The Appellant herein **JOSPEH KITAVI NZIOKI** was charged with the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the might of 31st day of December, 2016 at around midnight in Masinga County intentionally and unlawfully caused his penis to penetrate the vagina of L.N.K. a child aged 14 years.

The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual offences Act No.3 of 2006. The particulars were that on the night of 31st day of December, 2016 at around midnight in Masinga Sub-County within Machakos County intentionally touched the vagina of L.N.K a child aged 14 years with his penis.

2. The Appellant was arraigned before the Senior Resident Magistrate's court at Kithimani on 3/1/2017 and upon taking plea, was convicted and sentenced to serve twenty (20) years imprisonment upon his own plea of guilt. He was however aggrieved by the said conviction and sentence and raised the following grounds of appeal namely:-

i. That the learned Trial Magistrate erred in law and in fact by failing to ascertain beyond reasonable doubt the age for the complainant and convicted and sentenced the Appellant based on unsubstantiated evidence.

ii. That the learned Trial Magistrate erred in law and fact by failing to consider that the evidence produced to wit Exhibit 2 did not show the age of the complainant as 14 years but as 16 years old rendering the whole charge as defective.

iii. That the learned Trial Magistrate erred in law and in fact by convicting the Appellant based on an unsupported charge to wit : the age f the complainant rendering the charge as defective.

iv. That the learned Trial magistrate erred in law and fact by convicting and sentencing the Appellant on a defective charge by not explaining to the Appellant the court language and it is not shown on record that there was specific interpretation of the language the Appellant was comfortable with thus rendering the process inadequate for want of conformity with the law.

v. That the learned Trial Magistrate erred in law and fact by convicting the Appellant based on exhibits that were clearly tampered with

vi. That the learned Trial Magistrate erred in law and in fact by entering a plea of guilty against the Appellant when it was clear that the Appellant did not unequivocally plead guilty to the charge and particulars as per the court proceedings.

vii. That the learned Trial Magistrate erred in law and in fact by convicting and sentencing the Appellant in a situation where the plea entered by the Appellant was equivocal in the sense that as per the court record, the words by the Appellant in response were "Ni ukweli" "it is true that I was friends with her" and "the girl was my girlfriend, she concluded her class 8 exams and told me that she did not wish to pursue her education and hence spent the night at my place where we were arrested the following day "which is far short of the required standards and furthermore in languages which were not the languages indicated as the language of interpretation to the Appellant. Hence rendering the entire proceedings leading to the conviction and sentence null and void for want of conformity with the law.

viii. That the learned Trial Magistrate erred in law and in fact by convicting and sentencing the Appellant who did not understand the charge that he was being charged with to wit: the said charge was never read out nor stated to the Appellant as the record of proceedings clearly shows.

ix. That the learned Trial Magistrate erred in law by convicting and sentencing the Appellant on an equivocal plea.

x. That the learned Trial Magistrate erred in law and fact by failing to consider the mitigation by the Appellant and in particular failing to consider that the same amounted to a plea of not guilty.

xi. That the learned Trial Magistrate erred in law and in fact by convicting and sentencing the Appellant on evidence that were purely circumstantial.

xii. That the learned Trial Magistrate erred in law and in fact by failing to record a statement of facts relevant to sentence to wit; whether the appellant was a first offender or whether he had previous conviction making the proceedings, sentencing and convicting the Appellant null and void.

xiii. That the learned Trial Magistrate erred in law and fact by drawing wrong inference to prejudice the Appellant.

3. As this is a first appeal. The court's duty is to re-evaluate the evidence afresh and come to its own conclusion bearing in mind that it neither heard nor saw witnesses testify (see **OKENO =VS= REPUBLIC [1972] EA 32.**

4. The record of the lower court reveals that the matter did not go to full trial as the Appellant is reported to have pleaded guilty to the charges and was thus convicted and sentenced.

The first responses by the Appellant after the charge was read to him in the language which is not indicated replied as follows:-

"Ni ukweli"

The trial court went ahead to alert him of the seriousness of the charge and opted to have the charge read to him in Kikamba language to which he responded thus:

"It is true I was friends with her"

The trial magistrate proceeded to enter a plea of guilty and then called for the facts which were duly furnished by prosecution to which the Appellant responded:-

"The facts are correct"

The trial magistrate went ahead to convict the Appellant on his own plea and received mitigation from the Appellant which went as follows:-

"The girl was my girl friend, she concluded her class 8 exams and told me that she did not wish to pursue her education and hence slept the night at my place where we were arrested the following day."

5. Learned Counsels for the parties herein agreed to canvass the appeal by way of written submissions. I have considered the said submissions as well as the record of the lower court. I have also considered the several grounds of appeal lodged by the Appellant. I find the only issue for determination is whether the plea entered for the Appellant was unequivocal.

6. Mr. Machogu learned counsel for the Respondent rightly conceded to the appeal on the grounds that the plea was not properly taken and was therefore unequivocal. Indeed the record of the trial court reveals several misteps regarding the manner in which the Appellant's plea was taken ranging from absence of the language used as well as whether the Appellant understood the same.

Also the aspect on whether or not the Appellant was a first offender is not indicated. It seems the plea was hurried to the extent that the appellant did not clearly understand the whole process. Again from the replies of the Appellant, it seems he was qualifying the charge and which would have dictated the trial court to record a plea of not guilty for the Appellant and to call for a trial. The case of **ADAN VS REPUBLIC [1973] EA 445** has outlined the correct procedure in the plea taking process. In the above case the court of Appeal set out the steps to be undertaken in recording plea as follows:-

"When a person is charged, the charge and 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 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 these essential elements, the Magistrate should record what the accused has said, as nearly as possible in 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 opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with 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 alleged facts in any material respect the magistrate should record a conviction and proceed to hear any further facts relevant tot sentence. The statement of facts and the accused's reply must of course be recorded".

Looking at the response by the Appellant that he was friends with the girl, it is clear that he had not expressly admitted to a charge of defilement. Being friends with the girl and defiling her are completely two different things altogether. The Appellants response did not indicate whether he defiled the girl or committed an indecent act with her. It is clear that the Appellant herein did not understand exactly the essential elements of the charge preferred against him and therefore one cannot safely say that he had pleaded guilty to every element of the charge unequivocally. I find the plea was not unequivocal since there are doubts as to whether he had understood the charges read to him. This would explain the reason why the trial court had to resort to the use of Kikamba language in a bid to ensure that he understood the charge. However even with the use of Kikamba language did not help matters since he went ahead during mitigation to qualify the charge like he had initially stated when the charge was first read to him. The Appellant's mitigation clearly showed that the reply was equivocal and was not admitting to having committed the offence he was charged with when he stated that the girl slept the night at his place where they were arrested the following day. Hence the Appellant's comments during mitigation should have directed the trial Magistrate to change the plea to one of "Not Guilty" and proceed to hold a trial in the matter. The need for caution when recording a plea of guilty was re-emphasized in the case of **NJUKI =VS= REPUBLIC [1990] KLR 334** when it held that the court must satisfy itself that the accused understood every element of a charge and pleaded guilty to every element of it unequivocally.

7. In the result, I come to the finding that the plea entered for the Appellant was not unequivocal. That being the position it follows that the conviction and sentence was not safe and same is hereby quashed and set aside.

Having quashed the conviction and set aside the sentence the next issue for consideration is whether I should order a retrial in this matter. He court of Appeal in the case of **FATEHALI MANJI VS REPUBLIC [1964] EA 481** stated as follows regarding the issue of a retrial:-

> **"Even where a conviction is vitiated by a mistake of the trial court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of Justice require it and should not be ordered where it is likely to cause injustice to the accused person"**

8. It is noted that the plea herein was taken on 3/1/2017 and that the Appellant was sentenced to serve twenty years imprisonment. The Appellant has barely served a fraction of the sentence. The Appellant was not taken through a full trial and hence the prosecution's case is still fresh. I find there would be no injustice suffered by the Appellant if a retrial is ordered in this matter. Consequently the Appellant is ordered to be produced before the Principal Magistrate's court at Kithimani on the 25/07/2018.

Orders accordingly.

Dated and delivered at Machakos this 24th day of July, 2018

D. K. KEMEI

JUDGE

In the presence of:

Miss Kavita for Nzioka – for the appellant

Mr. Machogu for the Respondent

Josephine: - Court Assistant