



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 112 of 2017

BETWEEN

KYALO MUSYOKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Sexual Offence Case No. 111 of 2017 delivered by Hon. E. Ominde, CM on 16th August, 2017).

JUDGMENT

Background

1. Kyalo Musyoka, hereafter the Appellant was charged in the main count with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006 (revised 2011). The particulars of the offence were that on 3rd August, 2017 in Nairobi within Nairobi County, intentionally caused his penis to penetrate the anus of C.O, a child aged 15 years. In the alternative he was charged with an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 revised 2011 in that he unlawfully and intentionally touched the anus of C.O, a child aged 15 years.

2. He was convicted on his own plea of guilty and sentenced to serve twenty years imprisonment. He was dissatisfied with both the conviction and sentence as a result of which he preferred the instant appeal. He set out his grounds of appeal in a Memorandum of Appeal filed 24th August, 2017. They are that; (i)the sentence was unjustified and unfair, and (ii) that the honorable court did not accord him ample time to prepare himself to reply to the charge.

Submissions.

3. The appeal was canvassed before me on 12th June, 2018. The Appellant's main contention was that he was incarcerated in the police custody for too long before being taken to court to take plea. He argued that he was arrested on 3rd June, 2017 before being taken to court on 16th August, 2017 when he pleaded guilty because he did not want to lie. Ms. Atina for the Respondent in opposing the appeal submitted that the Appellant unequivocally pleaded guilty to the offence. She submitted that under Section 348 of the Criminal Procedure Code he could only appeal as to the sentence. She added that the sentence passed was lawful and urged the court to dismiss the appeal.

Determination.

4. I concur with Ms. Atina that under Section 348 Criminal Procedure Code "***No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence***". The court must however interrogate whether the plea of guilty was taken in a manner that accords with Section 107(1) and (2) of the Criminal Procedure Code and was unequivocal. The procedure to be followed while taking a plea was well enunciated in the renowned case of **Adan Inshair Hassan v. Republic**[1974] JAL 124, as follows:

"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 alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further fact relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.

The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, 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 for the statement of facts to precede the conviction.”

5. A look at the original record attests that the plea was both unequivocal and taken in the procedure underlined above. And so, it is safe to conclude that the only recourse to the Appellant is to challenge the legality of the sentence.

6. Be that as it may, the court must critically look at the circumstances under which the Appellant pleaded guilty. Although it not borne on record, he submitted that he was first taken to court on 3rd August, 2017. What is clear from the charge sheet is that this was the date of arrest. It is also clear that he took plea on 16th August, 2017, after having stayed in the police custody for about two weeks. This clearly points to a violation of his right to a fair trial as enshrined under Article 49 (1)(f)(i) of the Constitution; *the right to be brought before a court as soon as is reasonably possible but not later than twenty four hours after his arrest*. Sub-Article (1)(g) further states *that if it is not possible to produce an accused before a court within twenty four hours the court must be informed of the reason for his detention*.

7. The record of proceedings does not at all show that an explanation was given to the court for the reason of the Appellant’s detention in police custody for two weeks. I have no doubt in my mind that the long incarceration may have occasioned him to plead guilty. No wonder he submitted that he pleaded guilty because he did not want to lie to the court, a very unusual statement coming from an accused who is facing a serious offence. Besides, even after he pleaded guilty, the court did not warn him of the serious sentence that would follow, as prudence demands.

8. In the upshot, I find that that the circumstances under which the Appellant pleaded guilty utterly violated his right to a fair trial. In the interest of justice, a retrial should be conducted. I accordingly quash the conviction, set aside the sentence and order that a retrial be conducted. The Appellant shall be escorted to Kamukunji Police Station for the purposes of presenting him before Makadara Chief Magistrate’s Court to take plea not later than 2nd October, 2018. It is so ordered.

DATED and DELIVERED this 26th day of September, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*

2. *Miss Atina for the Respondent*