



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 25 of 2016

B. N. D.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Arising from the conviction and Sentence by Hon. Onsarigo Resident Magistrate

in Thika CM CRC 3554 of 2015)

JUDGMENT

1. The Appellant herein has appealed against both conviction and sentence of the Thika Chief Magistrate's Court Criminal Case No. 3554 of 2015.

2. The facts are quite brief. The Appellant was arraigned before the Learned Honourable Onsarigo on 15/07/2015 facing a single count of defilement and an alternative charge of committing an indecent act with a child.

3. The main charge alleged that on diverse dates between 22/06/2015 and 13/07/2015, the Appellant intentionally caused his penis to penetrate the vagina of FO, a child aged fourteen (14) years contrary to section 8(1) and (3) of the Sexual Offences Act No. 3 of 2006. The allegations were that he had defiled the minor in [particulars withheld] slums in Thika within Kiambu County.

4. In the alternative, the Appellant faced a 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 are that on diverse dates between 22/06/2015 and 13/07/2015, the Appellant intentionally touched the vagina of FO, a child aged fourteen (14) years in [particulars withheld] slums in Thika within Kiambu County.

5. When the charges were read to the Appellant at his first appearance in Court, he responded with the words: "It is true."

It would appear that he said those words in Kiswahili.

6. The Prosecutor then proceeded to narrate the facts as follows:

On 22/06/2015, when the Complainant, FO was sent home by the head teacher one Ms. Ndung'u to call her parents, instead of doing that, the [Complainant] went to her boyfriend who is the Accused Person who resides in Kiandutu. The Complainant lived with the Accused for two weeks and on 13/07/2015, the Complainant's father one called [particular withheld] got a tip off that his daughter was putting up at the Accused Person's house, where he went and found the Accused Person and

was taken to Kiandutu AP Post and later taken to Thika Police Station. The Complainant was taken to hospital and a P3 form was filled to that effect. A post-rape care form was prepared and I wish to produce the P3 form as Exh. 1 and the Post-rape care form as Exh. 2. The treatment notes from Thika Level 5 Hospital are Exh. 3.

7. On the narration of these facts, the Appellant responded as follows:

Facts are correct but the Complainant had been chased away by her father and it is true.

8. The Learned Trial Magistrate proceeded to convict the Appellant and, after considering his mitigation, proceeded to sentence him to twenty (20) years imprisonment.

9. On appeal, the Appellant raises two issues – well aware that one cannot appeal against a conviction on one's own guilty plea except to the legality of the plea. The two issues the Appellant has raised on appeal are as follows:

a. First, he contests that his guilty plea was equivocal;

b. Second, the Appellant argues that the plea was equivocal because he was not warned of the sentence he faced if convicted; and

c) Third, the Appellant claims that the charge was duplex and should *not* have resulted in a conviction.

10. Both points taken on appeal can be disposed off quickly after having had the advantage of reading through the short record of the trial court in its entirety and after re-evaluating the whole record and reaching my own conclusions as I am required to do as a first appellate court –see ***Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570.**

11. Mr. Kinyanjui argued the appeal for the State. He opposed the appeal on conviction but conceded that the Learned Trial Magistrate proceeded on the wrong principles in the sentence. He would be amenable to the reduction of the sentence imposed in the case.

12. On appeal, the Appellant attacked the finding of guilty plea in the lower court. He thought that the procedure was deficient and failed to meet the high threshold stipulated in section 207 of the Criminal Procedure Code and outlined in the famous case of ***Adan v Republic* (1973) EA 445 at 446.**

13. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in ***Adan v Republic*(1973) EA 445 at 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 guilty, 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 to sentence. The statement of facts and the accused's reply must, off course, be recorded.

14. The first point for analysis is an important point of departure namely the trite law stated by the Court in ***Ombena v Republic*1981 KLR 450**to the effect that whether a guilty plea is unequivocal or not depends

on the circumstances of the case. Differently put, an appellate or a revising court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea.

15. In this case, the charges were read to the Appellant in Kiswahili, a language he understood and does not contest on appeal that he understood. While the magistrate should have ideally recorded his response in Kiswahili, he recorded it in English “It is true.”

16. However, the Prosecutor proceeded to narrate the facts immediately after this as best practice suggests. After hearing the narration of all the facts, the Appellant responded that the facts were “correct but the Complainant had been chased away by the father and it is true.”

17. On appeal, the Appellant says that the “but” in his response to the facts indicate that the plea was equivocal because “it makes the statement ambiguous.”

18. In short, this is simply incorrect. The context of the sentence uttered by the Appellant during the plea makes it very clear that his plea was unequivocal. The “but” in his sentence did not detract from the elements of the crime at all but sought to explain the motive which is irrelevant for purposes of establishing the elements of the crime and unequivocality of the plea. What follows after the “but” is an explanation that does not negate the offence in any way but, in fact, proves its commission. In essence, the Appellant admitted to defiling the minor but justified it by the fact that the minor had allegedly been chased away from home by her father. Even if true that the minor had been “chased away” that would not negate the charge of defilement by the Appellant.

19. Next, the Appellant says that the plea was equivocal because the Learned Trial Magistrate did not warn the Appellant of the penalty he was facing for a guilty plea of the charges. Unfortunately for the Appellant, this, of itself, is also unavailing as a ground of appeal. It is a good practice to warn the Accused Person where there is a minimum sentence for a crime – but the failure to administer such a warning does not, at all, vitiate a guilty plea where it has been properly recorded as it was here. I should point out that the Constitutional provision the Appellant relied on to press this point – Article 50(2)(b) is inapposite for the point he wished to make.

20. Lastly, the Appellant argues, without much conviction I must say, that the charges were duplex and should not have resulted in a conviction. I say without much conviction because the Appellant does not at all explain what he means by this complaint. Upon looking at the charge sheet and the record, I can surmise that the Appellant must have been thinking of the typographical error in the charge sheet. The Charge sheet reads as follows:

“Defilement contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006.”

21. There is no section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. What the charge sheet meant was “Defilement contrary to section 8(1) as read together with section 8(3) of the Sexual Offences Act No. 3 of 2006.” Section 8(1) defines the offence and section 8(3) prescribes the offence.

22. However, the typo rendered as “section 8(1)(3) the Sexual Offences Act No. 3 of 2006” does not render the charge sheet duplex.

23. The rule against duplicity arises from the provisions of Section 134 of the Criminal Procedure Code. It provides-

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to the nature of the offence charged.

24. The essence of the rule is that it is impermissible for the Prosecution to allege the commission or more than one offence in a single charge sheet. This is because, as a matter of fairness, an Accused Person is entitled to know which crime they are alleged to have committed so that they can adequately prepare a

defence or plead guilty thereto.

25. The typographical error in the charge sheet here did not render it duplex at all. There is no possibility of confusion of two offences being charged here. Perhaps the Appellant meant to complain that the charges were defective. Even then, this would be unavailing. The technical deficiency in the charge sheet is curable under section 382 of the Criminal Procedure Code as a harmless error which did not occasion a miscarriage of justice.

26. Section 382 of the Criminal Procedure Code provides, in material part that:.... no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

27. 46. The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

28. Hence, here, we must ask ourselves when it is appropriate to find that a charge sheet is fatally defective. Our case law has given crucial pointers. Two cases are pertinent: the case of *Yosefa v. Uganda [1969] E.A. 236* – a decision of the Court of Appeals – and *Sigilani v. Republic [2004] 2 KLR 480* – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. *Sigilani v. Republic [2004] 2 KLR* held:

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

29. The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective. In this case, the Appellant was charged under section 8(1)(3) of the Sexual Offences Act. No such section exists in the Act. The question is: did this prejudice the Appellant and occasion a miscarriage of justice? I do not think so. There is no question in my mind that the Accused Person clearly understood the charges facing him well enough to understand the ingredients of the crime charged so that he could fashion his defence. In this case, he understood it well enough to offer an explanation when the facts were read out to him.

30. Hence, as our case law has established, the test for a defective charge sheet is a substantive one, not a formalistic one and when it is used here it establishes that the charges gave fair notice to the Accused Person to the charges he was facing, and the trial was fair in a substantive sense. No miscarriage of justice was occasioned by the typographical error in the charge sheet.

31. On sentence, the Learned Trial Magistrate sentenced the Appellant to serve life imprisonment in line with Section 8(2) of the Sexual Offences Act. That section provides that:

32. As for sentence, the Appellant was imprisoned for twenty years. This is the minimum allowable by the law upon conviction for an offence contrary to section 8(1)(3) of the Sexual Offences Act. Therefore, no appeal against sentence is possible here.

33. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

- a. For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.

b. The sentence imposed by the Trial Court of twenty years' imprisonment is affirmed.

34. Orders accordingly

Dated and delivered at Kiambu this 23rd day of March, 2017.

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JOEL NGUGI

JUDGE