REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 60 OF 2016

PETER IRUNGU NYAMBURA...……...…….APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

(Appeal from original conviction and sentence in Mukurweini Principal Magistrates' Court Criminal Case No. 220 of 2016 (Hon. V.O. Chianda, SRM) on 1st August, 2016)

JUDGMENT

The appellant was charged and convicted on his own plea of guilty for the offence of defilement contrary to **section 8(1) (2)** of the **Sexual Offences Act, No. 3 of 2006.** The particulars were that on the 19th day of July, 2016 at [Particulars withheld] village in Mukurweini subcounty within Nyeri county, the appellant intentionally caused his penis to penetrate the vagina of G W M, a child aged 6. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. Having been convicted of the principal count, this alternative charge was of no consequence and the learned magistrate did well not to make any further reference to it once he convicted the appellant on the main count.

The appellant was sentenced to serve life imprisonment as by law provided.

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 amended grounds of appeal which he filed together with his handwritten submissions, the appellant raised three grounds of appeal which I understand to be that the trial magistrate erred in law and in fact in convicting him on own plea of guilty without making any inquiry why he chose to take such a plea and therefore failed to comply with **section 11** of the **Penal Code**; that the learned magistrate erred in law in convicting and sentencing the appellant on a charge that does not exist; and finally, that the learned magistrate erred in law in failing to comply with **section 169 (1) (2)** of the **Criminal Procedure Code**, cap 75.

Although it is not so stated in categorical terms, the first ground of appeal appears to question whether the plea was unequivocal and if my assumption is right, the appropriate law to look up to in addressing this issue is **Section 207** of the **Criminal Procedure Code, Chapter 75 Laws of Kenya;** this provision of the law 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 for statement of facts to precede the conviction.

Turning to the appellant's trial, the record shows that the charges were read to the appellant on two different occasions; he pleaded guilty on the first occasion but rather than allow the statement of facts to be read and enter a plea of guilty, the learned magistrate entered a plea of not guilty after the prosecution applied to have the appellant subjected to a mental assessment. He was eventually assessed by a consultant psychiatrist who opined that the appellant was normal and fit to take plea and stand trial. With this report, the charges were read to the appellant the second time and just like he did when he took his initial plea, the appellant again pleaded guilty the second time. This time round the facts were read out to the appellant and when he was asked whether they were true he confirmed that the facts were true. It is then that the trial court entered a plea of guilty.

On the face of it, the learned magistrate appears to have substantially complied with the provisions of **section 207** of the Criminal Procedure Code; however, the record does not specify the language in which the charges and the statement of facts were read to the appellant the second time he took plea. The record does not also show in which language the appellant took plea and admitted the facts.

The omission to state the language the appellant understood and whether the charges and the statement of facts were read out in that particular language was a fundamental and, needless to say a fatal error on the part of the learned magistrate. In the absence of this information it cannot be concluded with any sense of certainty that the appellant must be taken to have understood the charges against him before he pleaded

guilty.

The importance of stating the language adopted by an accused person when taking plea was emphasised in **Adan versus Republic (supra).** The court was categorical that when a person is charged, the charge together with the particulars must be read out to him, so far as possible in his own language. Where it is impossible to read the charge and the particulars in his language, then they must be read in a language which he can speak and understand.

Without specifying whether the language through which the charge and the particulars were read to the appellant, it is virtually impossible to tell whether the language adopted by the court was the appellant's own language or was a language that he could speak and understand. Accordingly, it is not possible to tell whether the plea which the appellant took was unequivocal.

A trial court must always be cautious to comply and follow to the letter the procedure for taking pleas outlined in **section 207** of the **Criminal Procedure Code** and more so where, as was in the case against the appellant, a plea of guilty would result in an accused person spending the rest of his life in prison.

In conclusion, therefore, 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 any magistrate of competent jurisdiction other than Hon. V. O. Chianda. Accordingly, the deputy registrar is directed to return the original file together with a certified copy of this judgment to the principal magistrates' court at Mukurweini for the appellant's retrial. The appellants appeal succeeds to that extent only. It is so ordered.

Signed, dated and delivered in open court this 28th July, 2017

Ngaah Jairus

JUDGE