REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.142 OF 2015

TITUS NZIOKA .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal from the Sentence of Principal Magistrate's Court at Kithimani Law courts delivered by ***Honourable M. A . O Opanga (Senior Resident Magistrate)*** *on 18th May, 2015 in* ***Kithimani P.M.CR. (S.O.A) CASE NO. 32 OF 2015)***

JUDGMENT OF THE COURT

1. The Appellant herein **TITUS NZIOKA** was charged before the Principal Magistrate's court at Kithimani in Criminal Case No.32 of the 2015 (SOA) where he was charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No.3 of 2006. The particulars of the charge were that on the 12th day of May, 2015 in Masinga sub-County within Machakos County, intentionally caused his penis to penetrate the vagina of F S (name withheld) 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 with the particulars being that on the 12th day of May, 2015 in Masinga Sub-county within Machakos County intentionally touched the vagina of F S a child aged 14 years with his penis.

2. When the charges were read over to him, the Appellant pleaded guilty to both the charges and facts. The trial Magistrate proceeded to enter a plea of guilty, convicted the Appellant and sentenced him to serve twenty (20) years imprisonment. It is the said conviction and sentence that has now triggered the instant Appeal.

3. The Appellant raised the following grounds of appeal:

> ***(a) That the learned trial Magistrate failed to comply with the Provisions of Articles 25 (c) and 50(2) (a) of the Constitution.***
>
> ***(b) That the learned trail Magistrate failed in point of law and fact by not considering that the charge was equivocal.***
>
> ***(c) That the learned trial Magistrate erred in law and fact in failing to consider the case on its merit.***

4. The Appellant filed submissions. It was submitted for the Appellant that the plea was not unequivocal since the appellant did not understand the language used by the court. The Appellant submitted that the

full ingredients of the charge were not explained to him and that his rights to fair trial under Article 50(2) (b) were violate. The Appellant sought reliance on the case of **ADAN =VS= REPUBLIC [1973] EEA 445**.

5. It was submitted for the Respondent that Section 348 of the Criminal Procedure Code does not allow Appeal where an accused has pleaded guilty except to the extent of illegality of sentence. Counsel for the Respondent submitted that the plea was unequivocal as the charges were read to Appellant in a language he understood and pleaded guilty. Further the medical evidence vide the P.3 form showed the Complainant aged 14 years had been defiled and finally the sentence meted out was legal vide Section 8(1) (3) of the Sexual Offences Act and that the appeal lacks merit and should be dismissed.

6. This being a first Appeal, this court is obligated to reconsider and re-evaluate the evidence tendered before the lower court afresh with a view to reaching its own independent conclusion. (see **PANDYA =VS= REPULBIC [1951] EA 336 and OKENO =VS= REPUBLIC [1972] EA 32).**

7. In this Appeal however, the Appellant pleaded guilty to the charge and hence a full trial was not conducted. I will scrutinize the record of the lower court so as to establish whether or not the plea was unequivocal. The record reveals that the Appellant was arraigned on the 18/5/2015 before Hon. M.A.O. Opanga and the court clerk appears to have relied on some standard form of reading charges which were super imposed on the court file. The language of interpretation was indicated as English/Kiswahili/Kikamba. The Appellant Responded with the word ***"True"*** and after the facts had been read by the court prosecutor, the Appellant's response was "***Facts are correct***". The Learned trial Magistrate indicated a plea of guilty on the main count and after the Appellant's Response on the facts, the record indicates that the Appellant was convicted on his own plea of guilty. The court record does not indicate whether the alternative charge was read over to the Appellant.

8. The court of Appeal set out the steps to be undertaking in recording a guilty plea in the case of **ADAN =VS= REPUBLIC [1973] EA 445** 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 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 guilt. 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 statements of facts or asserts additional facts which, if true might raise a question as to his guilt the Magistrate should record a charge 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 of course, be recorded".***

9. The need to exercise caution when recording a guilty plea was further re-emphasized in the case of **NJUKI =VS= REPUBLIC [1990] KLR 334** in which it was held that the court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.

10. Looking at the lower court record it is quite clear that the language used by the court to have the charge and particulars read to the Appellant is not clear since they were merely indicated as English/Kiswahili/Kikamba. Nowhere is it indicated that the language chosen and understood by the Appellant was English or Kiswahili or Kikamba. In the least case scenario, the language used would even have been ticked or underlined with a pen. Nothing of the sort took place. Again there is nowhere that the alternative charge was ever read to the Appellant. Further it was appropriate for the trial Magistrate to indicate that all the essential ingredients had been read and explained to the Appellant on a language he understood which language should have been indicated as well. As noted in the **ADAN =VS= REUBLIC (Supra)** it is clear that the recording of the plea was not properly conducted. This was

a serious offence and which attracted a lengthy period of imprisonment and it was imperative for the trial court to ensure that the Appellant understood everything. Besides, the Appellant was unrepresented and thus did not have the benefit of adequate legal advice. It is my finding that the Plea of guilty was not properly conducted and thus it was not unequivocal. For a guilty plea to be unequivocal, the steps set out on **ADAN =VS= REPUBIC (Supra)** must be followed. Again the record must be such that it leaves no doubt as to whether the accused understood the charges and confirmed them as true. I find that the plea in this case was not unequivocal and hereby quash the conviction and sentence.

11. Having quashed the conviction the next issue to consider is whether a retrial should be ordered. As to whether or not to order a retrial, this court shall be guided by the decision in **FATEHALI NANJI =VS= REPUBLIC [1964]** EA 481 where the court held thus:-

> "***Even where a conviction 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 of retrial should only be made whether the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."***

12. Looking at the record the Appellant was convicted and sentenced on 18/05/2015. There was no trial in his matter so as to guide this court whether indeed the Respondent's case is weighty or not. This court cannot speculate on that. The Appellant was sentenced to twenty (20) years imprisonment and has barely served a fraction of the same. I find the interest of justice tilts in favour of an order for a retrial. A retrial is not likely to cause injustice to the appellant in any way.

13. In the result I allow the Appeal, quash the conviction, set aside the sentence and order for a retrial in this case. The Appellant is ordered to be produced before the Principal Magistrate Court at Kithimani on **7/08/2017** for the purpose of retrial which shall be conducted by a different Magistrate other than Hon. M. O. Opanga.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **24TH** day of **JULY,** 2017.

D. K. KEMEI

JUDGE

In the presence of:

Machogu for Respondent

Appellant in person

C/A: Kituva