



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

H. C.C.R.A. NO. 24 OF 2015

(CORAM: J. A. MAKAU – J.)

J O OAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence delivered on 14.7.2015 in Criminal Case No. 450 of 2015 in Siaya Law Court before Hon. Hazel Wandere – P.M.)

JUDGMENT

1. J O O was charged with an offence of **Incest Contrary to Section 20(1) of the Sexual Offences Act. No. 3 of 2006**. The particulars of the offence are that on the 25th day June 2015, in Gem District within Siaya County a male person intentionally caused his penis to penetrate the vagina of **C A O** a female person who was to his knowledge his daughter.

2. That when the substance of the charge and every element thereof was read over and explained by the Court to the appellant in Dholuo Language which he preferred and understands he pleaded that **“it is true.”** The facts in support of the charge were given and translated to the appellant. P.3. form showing there was penetration and hymen not intact was produced as exhibit P.1. The discharge summary of the victim was produced as exhibit P.2. and age assessment Report as exhibit P.3. showing the complainant was aged between 11 and 12 years old. The P.3. form on the appellant was also produced as exhibit P.4. The appellant then admitted the facts and was convicted accordingly.

3. That after mitigation the trial magistrate sentenced the appellant to serve a life imprisonment.

4. Aggrieved by the conviction and sentence of life imprisonment the appellant lodged an appeal setting out four (4) grounds of appeal being as follows:-

a) He pleaded guilty to the above appended charge.

*b) There was controversial of the law by the convicting court by failing to read over the dire consequences of the proffered charge in a language that he could understand better as envisaged under **Article 50(2) of the current 2010 Constitution** of Kenya to meet the required standards of a fair trial, thus unconstitutional sentence and conviction.*

*c) The presiding court failed to invite the deserved doctrines of natural justice in the instance case by failing to according the appellant an opportunity to come up with his defence case as envisaged under **Article 50(2) of the 2010 Constitution of Kenya** thus unsuitable and unsustainable.*

d) The mitigation factors invited a full trial and not instant conviction for it was an indirect way of plea of not guilty.

5. At the hearing the appellant appeared in person while M/s. M. Odumba Learned State Counsel represented the State.

6. The Appellant relied on his written submission and had nothing else to add to his written submissions. The appellant contended that the prosecution failed to inform him and warn him of the harsh penalty and failure whereof he urged resulted to miscarriage of justice.

7. The State in opposing the appeal submitted that the conviction and sentence was proper as the appellant was convicted on his own plea of guilty, and on admitting the facts which were read and explained to him in Dholuo language which he understands, that he was accorded a fair trial, that he mitigated and his mitigation were considered and court gave reasons for meted sentence, that the facts given satisfied the ingredients of the offence, as P.3. form confirmed penetration. The treatment notes also showed the injuries and confirmed penetration. The court imposed proper sentence.

8. The appellant in ground No. 1 of his appeal admitted that he pleaded guilty to the offence. The court record reveals that on 4.7.2015 when he first appeared before the court the substances of the charge and every element thereof was read over and explained in the Dholuo language which he understands. He pleaded that ***“it is true”*** but when facts were given he denied facts and plea of not guilty entered. That immediately on the same day the case was ordered to proceed before court No. 1 as it involved a minor. That the appellant had the charge read to him once again before hearing to which he said ***“it is true”***. Facts were given and admitted upon which he was accordingly convicted. The appellant never raised a complaint that he did not understand the charge. The facts given support the charge of incest as the appellant admitted that the victim ***“C.A.O.”*** is his daughter.

9. Section 20(1) of the Sexual Offences Act provides:-

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:”

10. In view of the foregoing I find the charge was proper, that plea was properly taken and the facts supports the charge. The appellants contention that he was not informed and warned of the harsh penalty cannot be a basis for interfering with conviction based on ones plea of guilty as ignorance of law is no defence at all. I note contrary to appellant's assertion the language of the court is clearly stated as Dholuo language which the appellant understands.

Article 50 (1) (2) (b) (m) of the Constitution of Kenya 2010 provides:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right-

(b) to be informed of the charge, with sufficient detail to answer it;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;”

the said article do not require the court to inform the accused person of the penalty before the hearing. That before hearing of the case the accused is presumed innocent till proved guilty. The failure for trial court to do so did not prejudice the accused person and cannot be a ground for interference with trial

court's judgment.

11. I have carefully perused the trial court's proceedings and it is evidently clear that the appellant was informed of the charge with sufficient details to answer it and he had assistance of an interpreter who translated the language used into language of appellant's preference and which he understands being Dholuo language. I therefore find no violation or breach of the appellant's rights to have a fair trial. I find no merits in ground No. 2 of the petition of the appeal.

12. The appellant in ground No. 3 of the petition of appeal contend that he was denied justice in that he was not afforded an opportunity to give his defence as envisaged under **Article 50(2) of the Constitution of Kenya.**

Article 50 (2) (a) (b) (e) (f) of the Constitution of Kenya provides:

“(2) Every accused person has the right to a fair trial, which includes the right-

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;”

13. I agree entirely with the appellant **Article 50 of the Constitution 2010** has to be applied to the letter if a fair trial is to be achieved. That a fair trial commences by presuming every person charged with an offence to be innocent until the contrary is proved, that before a charge is read the court has to ascertain the language that the accused prefers and understands. That once the substance of charge is read and explained in the preferred language and the language the accused understands and he pleads guilty to the charge and subsequently admits the facts upon being read and explained to him in the language he prefers and understands the court is bound to convict the accused on his own admission of fact of the case. The accused opportunity to come up with his defence or explanation is completely shut out by his admission of the facts in support of the charge. He cannot urge to give his defence or call witnesses but can mitigate for the court to consider the sentence to impose, therefore I find that the appellant's Constitutional rights to a fair trial were not violated or breached or infringed by failing to give him an opportunity to call witnesses after conviction as defence is only required when an accused person has been found to have a case to answer but not in a case where an offence has been admitted and plea of guilty and conviction has been entered. The ground of appeal is without merits and is dismissed.

14. The appellant's ground No. 4 of his petition of appeal contend that his mitigation factors invited for a full trial and not an instant conviction for it was an indirect way of plea of not guilty. The appellant in his mitigation stated:-

“I am all alone in my home. Nobody to help me. I pray for non-custodial sentence”

The appellant in his mitigation did not raise any points proving his retraction of plea of guilty. He did not challenge the facts or stated anything to cause the court infer that he was indeed changing his plea from guilty to a plea of not guilty. That if anything in his mitigation he was seeking leniency and asking for non-custodial sentence. There is nothing in his mitigation to which it can be inferred that the appellant meant he was not guilty. I find no merits in the fourth ground of appeal.

15. The upshot is that the appeal is without merits and is dismissed. The conviction is upheld and sentence meted against the appellant confirmed.

DATED AND SIGNED & DELIVERED AT SIAYA THIS 28TH DAY OF APRIL, 2016.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

Appellant: Present in person

M/s. M. Odumba for State.

Court Clerk: Kevin Odhiambo

Court Clerk: Mohammed Akideh

J. A. MAKAU

JUDGE