



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 23 OF 2015

PAUL NYAGA MBAKA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

*(Being an appeal from the original conviction and sentence in CR 174 OF 2015 at Runyenjes
Principal Magistrate's Court by J.P. Nandi - SRM on 26th March, 2015)*

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of thirty years imprisonment following his plea of guilty to a charge of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006 imposed upon him by the court of the Senior Resident Magistrate at Runyenjes on 26th March, 2015.
2. The respondent/state has supported both the conviction and sentence.
3. This is a first appeal. As a first appeal court according to *Adan v. R (1973) EA 445* I am required to re-examine the record and satisfy myself that the plea was properly taken and was voluntary.
4. According to that case, the trial court is required to ensure the following. First that the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language that he understands. Second, the accused own words should be recorded and if they are an admission, a plea of guilty should be recorded. Third, the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts. Fourth, if the accused does not agree the facts or raises any questions of his guilt his reply must be recorded and a change of plea entered. Fifth, if there is no change of plea, a conviction should be recorded and a statement of the facts relevant to the sentence together with the accused's reply should be recorded.
5. The appellant has raised five grounds of appeal in his petition to this court. In ground 1 he has challenged the trial court for failing to consider that the language used during the trial was English which he says he could not understand, because there was no interpreter. The record shows that there was an interpreter by the name Gitau who interpreted in both Kiswahili and Kiembu. The record further shows that after the charge was explained to him, he is recorded to have stated that: "*it is true.*" This ground of appeal is without merit and I hereby dismiss it.
6. In ground 2 he has faulted the trial court for failing to consider that the appellant was threatened with death by the arresting officers in order to plead guilty to the charges filed against him. The appellant in

this regard is raising this matter for the first time on appeal. I find that the record of the proceedings does not show that the appellant complained to the trial court that he was threatened. I find that this is an afterthought and I therefore reject it.

7. In ground 3 the appellant has faulted the trial court for failing to indicate the offence upon which he was convicted. It is clear from the proceedings that the appellant was convicted on his own plea of guilty to a charge of defilement as indicated in paragraph 1. It is therefore not correct to assert that the trial court did not indicate the offence in regard to which he was convicted. This ground of appeal also fails and is hereby dismissed.

8. In ground 4 the appellant has faulted the trial court for failing to inform the appellant of his constitutional right to be represented by an advocate at the government expense, which he asserts is in violation of Article 50 (2) (g) (h) of the 2010 Constitution of Kenya. Parliament had not enacted an implementing or enabling legislation providing for legal aid to persons who are charged with serious offences. It therefore follows that the trial court was not in a position to make an order in the absence of the implementing or enabling parliamentary legislation. This ground of appeal also fails and is hereby dismissed.

9. In ground 5 the appellant has faulted the trial court for failing to observe that a plea of guilty in respect of this offence carried a mandatory minimum sentence and it did not warn the appellant of the dangers of pleading guilty. I find that the trial court was not under an obligation to warn the appellant of the mandatory sentence. All that was required of that court was to ensure that the appellant understood the charges against him.

10. The trial court was under an obligation to ensure that the plea of the appellant was voluntary. In view of the interpretation which shows that Kiambu language was used, which was understood by the appellant, I find that the plea was properly taken. However, I wish to point out that the usage of the phrase “*it is true*” in answer to a charge is not adequate. Instead, the exact words used by the appellant should be recorded. This will show that the appellant understood and voluntarily pleaded guilty to the offence. This is the only requirement which the Court of Appeal approved in the case of *Adan v. R, supra*.

11. In the light of the foregoing, I find that the appellant was properly convicted on his plea of guilty and sentenced to thirty years imprisonment on a charge of defilement. I also find that the trial court properly left the alternative charge of indecent act open namely by not make a finding in respect of that charge.

12. The upshot of the foregoing is that the appeal is dismissed in its entirety.

JUDGEMENT DELIVERED, DATED and SIGNED at EMBU this 14th day of JUNE 2016.

In the presence of the appellant and Ms Mbae for the respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

14.06.16