



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL APPEAL NO. 8/2016**

**P M M .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. This matter first came to the attention of the court *vide* a Chamber Summons Application dated 18<sup>th</sup> July, 2016 filed under a Certificate of Urgency. In the main, the Application sought for orders:

- a. That it be certified urgent
- b. That the Court orders a stay of execution of the sentence imposed against the Applicant by the Learned Magistrate in Thika Criminal Case No. 4712 of 2016; and
- c. That the Court grants bail pending hearing and determination of the Criminal Appeal No. 1 of 2016.

2. The matter was placed before me on 19/07/2016 and I certified the matter urgent, requested that the Application be served on the Office of the Director of Public Prosecutions (ODPP) and that the parties appear before me on 25/07/2016.

3. The basis of the intended appeal is three-fold: First, the Applicant argues that the Trial Court convicted on an equivocal plea of guilty. Second, the Applicant states that he is a minor and the Trial Court convicted and sentenced him as an adult. Third, the Applicant states that the sentence was unduly severe in the circumstances.

4. As appointed, the matter came up again on 25/07/2016. Mr. Kanyi appeared for the Appellant/Applicant. Ms. Maundu came on record for the State. Ms. Maundu indicated that she would most probably be opposed to the appeal and application. She suggested that it would make sense to proceed directly and argue the appeal and forego the Application since the sparse record of proceedings was ready anyway. She was, however, not ready to argue the appeal on the spot. Mr. Kanyi would have been okay to argue the appeal directly.

5. On a cursory perusal of the materials, I urged the parties to address me the propriety of revision as the avenue to deal with the case given the circumstances especially the alleged age of the Appellant/Applicant. Mrs. Maundu was agreeable to that course of action but requested the court to order an age assessment to indicate the way forward. Mr. Kanyi, similarly, had objection to a revision but requested for an expedited ruling. I reserved my ruling on the revision for 27/07/2016.

### **ISSUES FOR REVISION**

6. The law permits the High Court to take up any ruling, judgment, order or sentence on review. The jurisdiction of the High Court to review or revise orders of a Magistrate's Court or Tribunal is underpinned by the Constitution at Article 165(5) which comports with section 362 as read together with section 364 of the Criminal Procedure Code. The facts of this case make this an appropriate case for review. As none of the parties were opposed to this course of action even when granted an opportunity to be heard, I need not belabour the justification for this choice of this course of action.

7. In my view, the matter warrants review on all the three grounds suggested as grounds of appeal. In view of the position I have taken on the issue of the equivocality of the guilty plea and the age of the Appellant, I do not reach the question of severity of sentence.

### **THE EQUIVOCALITY OF THE GUILTY PLEA**

8. The Accused Person was first presented in court on 24/06/2016. The charge was wilfully exposing a child to unnecessary suffering contrary to section 127(1)(a) of the Children Act No. 8 of 2001. The particulars of the offence were stated as follows:

P M M: On the 23<sup>rd</sup> day of June, 2016 at Githurai Kimbo within Kiambu County jointly with others not before court wilfully subjected N C who is a child age 7 years to suffering.

9. The court records then indicate as follows:

COURT: The substance of the charge and every element thereof has been stated by the court to the accused person in the language he/she understands, who being asked whether he/she admits or denies the truth of the charge replies:

ACCUSED: Ni Kweli

Plea of guilty is entered

Prosecution: I pray for fact[s] to be delivered.

COURT: Fact[s] on the 27/06/16

10. Eventually, the Accused Person was presented before a different magistrate (Hon. B.N. Ileri) on 28/06/2016 where the Court records the Prosecutor presenting the facts as follows:

Facts on the accused was over on the streets at Progressive area at Githurai45 moving up and down with a special child at around 8:00am one Mr. Kamau representative with people with disability decided to monitor the accused till 3:00am when he and the members of the public asked the accused what he was doing with the child, he was pushing her with a wheel chairs it emerged accused was using the child to solicit money, the investigating officer went to the scene after the matter was reported to the police, it emerged the suspect was a Tanzanian National where he was working with a cartel every morning to collect the money using the child who was not fed when the accused was arrested and was kept in cold clothing. The child was rescued, the accused was arrested and charged. The child is in court. I produce some coins, a small bag and cup as exhibits.

(The facts are recorded exactly as they appear in the typed proceedings.)

11. 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, of course, be recorded.

12. 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.

13. With this totality of circumstances test in mind, the following observations are appropriate from the proceedings in the Magistrates' court.

14. First, although the Court record indicates that the charge and every element thereof was stated by the court to the accused person in the language he understands, it is critical that the court does not state which language was used to explain. Although the Court commendably records the Accused Person's response in Kiswahili verbatim exactly as he uttered them, it is salutary practice for the Court to indicate in which language the charge and the elements thereof were explained to the Accused Person. This did not happen here. This in itself would be enough to raise questions about the guilty plea.

15. Second, while the law on un-equivocality of plea is clear that an equivocal plea of guilt cannot stand, the courts have held that equivocality and ambiguity in a plea of guilty is not only a function of the exact language used by the Accused Person. There is no mathematical or magical word that denotes un-equivocality. In *R v. Adan*, the Court doubted that the use of the word "guilty" in our East African circumstances can be taken to mean that the Accused Person knowingly pleaded to the offence and the facts. The courts have stressed that it is important that the Court makes sure that the Accused Person understands not only the charge but each of its elements. The words the Accused Person uses must, in context, be seen as an admission of the charge and its ingredients. In the particular context of this case, the words "Ni Ukweli" do not inspire confidence that the Accused Person properly understood the charge and its ingredients.

16. Third, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. In those cases, care should always be taken to see that the Defendant understands the elements of the offence, especially if the evidence suggests that he has a defence. See *R v. Griffins*, 23 Cr. App. R. 153 and *R v. Blandford Justices ex p. G (an infant)* [1967] 1 QB 82. In *R v. Blandford* at pp. 90C-G-91 Widgery J. had this to say by way of expressing the heightened obligation of the Court in these circumstances:

In case where the defendant is not represented or where the defendant is of tender age or for any other reasons there must necessarily be doubts as to his ability finally to decide whether he is guilty or not, the magistrate ought, in my judgment, in these cases, to defer a final acceptance of plea until he has a chance to learn a little bit more about the case, and to see whether there is some undisclosed factor which may render the unequivocal plea of guilty a misleading one.

17. To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea.

18. Fourth, the relative youthfulness of the Accused Person adds an extra red flag that should have heightened the duty of the Court in the present circumstances. Even without prejudging the age of the victim, the fact that the Accused Person would have appeared to the Court as a person of youthful characteristics should have triggered the heightened duty in the court.

19. Lastly, *Adan v R* extolled the importance of the Prosecution being ready with the facts before an Accused Person's plea is recorded as one of guilt. Where, as here, the Prosecution does not have the facts ready and seeks an adjournment to read the facts, the appropriate practice would be for the Court to either read the Charge sheet to the Accused Person again or otherwise remind him of his guilty plea before the facts are read. This serves the purpose of having the Accused Person temporally affiliate his guilty plea with the facts being read to him so that he can respond appropriately in a manner that warrants the conclusion that the guilty plea is knowing, voluntary and unequivocal. In this case, a plea of not guilty was entered on 24/06/2016 and the facts were read to the Accused person on 28/07/2016 before a different magistrate without the Accused Person benefiting from a re-reading or reminder of the charges facing him.

20. In my view, all the above factors point to an equivocal guilty plea that should have been entered correctly as "Not Guilty." This is reason enough to revise the orders and sentence given in the Case which I hereby do.

### **THE AGE OF THE APPELLANT**

21. However, there is one other matter that the Appellant has now raised: his age. The Appellant argues that he is a minor who should not have been charged with the offence as the nature of that offence dictates that it is impossible for it to be committed by a minor. Secondly, the Appellant argues that as a minor, he cannot be sentenced to serve time in an adult prison anyway. The Appellant has produced some identification documentation that gives some plausibility to these arguments.

22. Both these arguments are predicated on the age of the Appellant. This is an issue which was, admittedly, never raised in the Magistrate's Court. It is, therefore, coming up for the first time. As both the Prosecution Counsel and the Appellant's Counsel accepted, the correct procedure, in the circumstances, is to order for an age assessment of the Appellant. Such an age assessment will definitively settle the question. I accept this as the correct procedure.

### **ORDERS AND DISPOSITION**

23. In the end, therefore, the orders and directions of the Court are as follows:

- a. The guilty plea entered in Thika Law Courts Criminal Case No. 4712 of 2016 is hereby set aside. In its place a plea of not guilty shall be recorded in the case.
- b. The sentenced imposed on the Appellant is hereby consequently set aside.
- c. The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Magistrates' Court for a retrial as ordered below.
- d. The Appellant shall forthwith be escorted for an age assessment. A report by the Medical Expert carrying out the age assessment shall be filed in the Magistrate's Court hearing the criminal case on re-trial.

e. The Appellant shall be presented before the Chief Magistrate, Thika Law Courts on Friday, 29<sup>th</sup> July, 2016 for further directions on the re-trial in accordance with this ruling and the age assessment report to be filed in the case.

f. The re-trial to be presided over by a magistrate other than the Honourable G. Omodho and the Honourable B.N. Ireri who previously handled the case.

The Deputy Registrar is directed to send back the Trial Court file in Criminal Case No. 4712 of 2016 and a copy of this file and ruling to the Chief Magistrate's Court, Thika for compliance.

**Dated and delivered at Kiambu this 27<sup>th</sup> day of July, 2016.**

.....

**JOEL NGUGI**

**JUDGE**