REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 28 OF 2016

(CORAM: J. A. MAKAU – J.)

EVANS OUMA ODUOR …............... APPELLANT/APPLICANT

VERSUS

REPUBLIC …... RESPONDENT

(Being an appeal against both the conviction and the sentence DATED 24.3.2016 in Criminal Case No. 289 of 2016 in SIAYA Law Court before Hon C.A. OKORE – R.M.)

JUDGMENT

1. The **Appellant EVANS OUMA ODUOR** was charged with an offence of defilement contrary to **section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 28th day of February 2016 at Rang'ala Sub-location in Ugunja District within Siaya County intentionally caused his penis to penetrate the vagina of CAO, a child aged 16 years. The Appellant faced an alternative charge of committing an **indecent Act with a Child contrary to Section II(1) of the Sexual Offences Act No. 3 of 2006.** The particulars of the alternative charge are that on the same day same place the Appellant intentionally touched the vagina of CAO a child aged 16 years.

2. The Appellant was convicted on his own plea of guilty and sentenced to serve 15 years imprisonment. The conviction and sentence provoked this appeal.

3. The Appellant in his petition of appeal set out five(5) grounds of appeal being as follows:-

> ***(a) That he pleaded guilty in the charges before the trial court and was sentenced to serve 15 years imprisonment without being given time to mitigate.***
>
> ***(b) That he was in a state of confusion and hence plea of guilty.***
>
> ***(c) That he was sentenced despite the lack of forensic report being adduced before the court to confirm the charges.***
>
> ***(d) That no witnesses were present before the honourable court to ascertain the facts of the prosecution if they were true or just a mere make up and theories.***
>
> ***(e) That the age of the complainant was not confirmed before the sentencing hence denial of the rights entitled to persons detained.***

4 . At the hearing of the appeal the Appellant appeared in person whereas the State was represented by

M/s. M. Odumba learned State counsel, the Appellant urged that when the charge was read to him he was confused, afraid and did not know what was happening before the court hence he admitted facts which he did not understand. He relied on his grounds of appeal and sought a retrial. M/s. M. Odumba learned State Counsel preferred for retrial as the Appellant did not understand the charge and was confused. She urged the proceedings do not show in what language the Appellant pleaded to the charge, the matter was fresh and the prosecution is able to trace and avail witnesses.

5. I have carefully perused the proceedings, considered the Appellant's petition and submission by both the Appellant and the State Counsel, the revelation from the court proceedings are that the language which the Appellant indicated to court to understand and wished the proceedings to be conducted in was Dholuo, however the trial Court read and explained the substance and every element of the charge in English/Kiswahili, the language that the Appellant did not understand. The record shows he is said to have replied in English/Kiswahili/Dholuo. The plea-taking was contrary to the language that the Appellant understands. It was contrary to **Article 50 (1), 2 (b), and (m) of the constitution of Kenya 2010** which provides:-

6. The issue for consideration from the trial court's proceedings is whether the plea was unequivocal. The lower court record reveals that after the charge was read and explained in English/Kiswahili language which he did not understand he replied in English/Kiswahili/Dholuo "***it is true, I did it***." Further facts were given in undisclosed language as there is no language referred to as English/Kiswhaili/Dholuo language. The Appellant is said to have replied that ***"the facts are correct. I slept with her since I loved her."*** the court then entered a plea of guilty and proceeded to convict the Appellant on his own plea of guilty.

7. In the case of **Adan V. Republic (1973) E.A. 542 the Court of Appeal** set out the procedure to be adopted in plea-taking. It held thus:-

> ***"(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;***
>
> ***(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;***
>
> ***(iii) 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;***
>
> ***(iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;***
>
> ***(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused;s reply should be recorded"***

8 In the instant case the Appellant informed the court the language that he understood and wished to be used to interpret the proceedings to him to be Dholuo, however the charge was read and interpreted in English and Kiswahili language, that he did not understand. He is said to have told the court "***It is true. I did it***." These words standing on their own did not constitute an unequivocal plea of guilty especially where the charge and all the essential ingredients of the offence are read and translated to the accused in another language other than his language or in a language he understands.

9. I have considered the lower court proceedings and I am satisfied that the conviction of the Appellant is not proper as the plea- taking was defective and contrary to the provisions of the constitution and also in that the principles set out in plea-taking in the case of **Aden V Republic (supra) and the Constitution** were flaunted. The language of the Appellant or language that he understood or language of his choice in conducting the proceeding was not used. The Appellant in this appeal urged he was confused and afraid and that he did not understand what was going on. This is simply because the trial court failed to use the language of the Appellant and have the charge and all the essential ingredients of the offence explained to

the Appellant. The Appellant must have answered on a charge that he did not understand. In view of the failure by the trial court to use the language of the Appellant, I am satisfied the plea was not unequivocal plea of guilty.

10. I further have to state that the language indicated by the trial court as English/Kiswahili/Dholuo in my view obscured the particular language that was used and even more so whether the language used is one that the appellant understands. The record of the trial court is confirming that and that lapse affected the tenor of the proceedings thereby diverting the course of fair trial. The constitution enjoins court to use a language or interpret the proceedings into the language an accused understands. The court should specifically record the language accused understands and language used or used to explain the substance of the charge and every element of the charge thereto. The recording of more than one language should not be encouraged as it confuses the actual language that the court used or obscures the particular language used, rendering the whole process a nullity.

11. In view of the above reasons, I find and hold that the trial court violated the constitutional rights of the appellant as regards fair trial as enshrined under **Article 50 of the constitution,** thereby making the whole proceedings a mistrial.

12. Whether I should order a retrial? The learned State Counsel concedes the appeal and rooted for a retrial. She urged that the case is fresh, and it would not be difficult to trace and avail witnesses. The principles which should guide the court for ordering a retrial were well set out in the case of **Lelimo Ekimat V R CRA No. 51 of 2014 (unreported)** where it was held:-

> ***"the principles that has been acceptable to courts is that each case must depend on particular facts and circumstances of that case but an order for retrial should only be made when interest of justice requires it."***

13 The Court of Appeal amplified further the principles in the **Ekimat case (supra)** by enumerating some specific consideration which a court should take into account in deciding when a retrial should be ordered. Some of the consideration include the following

a. ***Whether a retrial will occasion injustice or prejudice to the appellant.***
b. ***Whether it will give the prosecution an opportunity to fill up gaps in its evidence in the first trial and,***
c. ***Whether upon consideration of the admissible or potentially admissible evidence a conviction may result.***

14 The appellant herein stood trial on 24th March 2016, M/s. M. Odumba learned State Counsel informed the Court that witnesses will be available. That both the Appellant and State counsel rooted for retrial, considering the above, there is no likelihood that the Appellant will suffer prejudice by ordering of a retrial. I therefore find that this is a suitable case for ordering a retrial.

15. The upshot is that this appeal is merited. I quash the conviction and set aside sentence and order a retrial. The Appellant should appear before Principal Magistrate's Court at Siaya for taking of plea before another Magistrate other than M/s. C.A. Okore SRM, on 22nd July 2016.

DATED SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF JULY, 2016

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

Appellant in person - present

M/s. Mourine for State.

C.C.

1. Kevin Odhiambo.

2. Mohammed Akideh.

J. A. MAKAU

JUDGE