



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL APPEAL NO. 22 OF 2016

(CORAM: J. A. MAKAU – J.)

PETER OUMA OGOLA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence DATED 19.11.2015 in Criminal Case No.1090 of 2014 in BONDO Law Court before Hon M.M. NAFULA – S.R.M.)

JUDGMENT

1. The Appellant **PETER OUMA OGOLLA** was charged with an offence of defilement contrary to **section 8 (1)** as read with **section 8 (4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 25th day of November, 2014 at about 2.00 a.m. in Bondo District within Siaya County unlawfully and intentionally caused his penis to penetrate the vagina of **BA** a girl of the age of 13 years. He also faced an alternative charge of **committing an indecent Act with a child contrary to Section II (I) of the Penal Code No. 3 of 2006**. The particulars are that at the same date, time and place, unlawfully and intentionally touched the vagina of **BA** a child aged 13 years using his penis.

2. The Appellant was convicted on his own plea of guilty and sentenced to serve 15 years imprisonment.

3. Aggrieved by the sentence the appellant preferred this appeal setting out the following grounds of appeal:-

a) That he pleaded guilty to the charges and as he was at a state of confusion.

b) That he was an orphan and a father to tender children who depend solidly on him. His imprisonment will deny the children access to education and basic needs.

c) That he is the first offender who is reforming and is currently enrolled in Theology classes and industry section yet to do his grades and exams.

d) That his mitigation facts be considered and his sentence be reduced for ease access to assist the vulnerable.

4. At the hearing of the appeal the Appellant urged that he was arrested and charged in his life time for the first time and he was not familiar with what was going on. He prayed for the sentence to be reduced.

5. M/s. M. Odumba , the Learned State Counsel though the Appellant had appealed against sentence

concedes the appeal on the grounds that the facts did not disclose the offence with which the appellant was charged, urging further she does not know whether the sentence was proper or not as the victims age was not established. She further urged that this is a 2014 matter and cannot root for retrial because she is not sure that the witnesses can be traced and the retrial may prejudice the Appellant.

6. I have perused the plea-taking at the trial court and the issue is whether the plea was unequivocal. The trial Court's record show that the Appellant after the charge was read and explained to him he replied as follows: "***It is true.***"

7. The prosecution gave facts of the case as follows:- That on 24/11/2014 at 10.00 p.m. the complainant was with her age-mates sleeping when the Appellant entered the house and defiled the complainant. The complainant was taken to the hospital, treated and P3 form filled by a clinical Officer (***P.3. form and treatment notes produced respectively.***) The Appellant was then arrested and charged.

8. The Appellant replied thus:- "***Facts are true.***" and plea of guilty entered, the court did not convict the appellant as per its record but went ahead to sentence the Appellant to serve 15 years imprisonment.

9. That after facts were given in support of a charge which the accused had pleaded guilty to the the court on admission of the facts was supposed to convict the accused. That however before the court convicts the accused, the facts given in support of the charge are supposed to disclose all ingredients constituting the offence which the facts should prove the offence. In the instant case, the prosecution was required to give facts proving all the ingredients of an offence of defilement, thus identification, recognition, penetration and age. The prosecution was supposed to prove identification through the facts, penetration through production of the P3 and age through production of documentary evidence.

10. In the instant case facts as given did not disclose the age of the victim nor how the assailant was identified. The facts as given did not disclose the offence of defilement and trial court should not have entered a plea of guilty as the facts did not support the charge. The facts did not prove the charge and the trial court should have declined to convict the Appellant and should have either given prosecution time to amend or substituted the charge or ordered the case to proceed to hearing to be determined on merits.

11. In the case of **Paul Irungu Maina V. Republic HCRA No. 1209 of 2007 (Nakuru)** the Court held that the words "***It is true***" standing on their own did not constitute an unequivocal plea of guilty.

12. In the case of **Adan V. Republic (1973) E.A. 445** Court of Appeal held:-

a) The learned trial Magistrate erred in law in finding the appellants guilty yet her plea of guilt was not unequivocal.

b) The learned trial Magistrate erred in law in convicting the appellant based on a defective charge sheet.

c) The learned trial Magistrate erred in law in convicting the accused persons, yet key ingredients of the charge was not proved by the prosecution.

d) The learned trial Magistrate erred in law in convicting the appellant yet no scientific report was produced in Court by the Government Chemist to prove that the contents does not conform to the provisions of the Alcoholic Drinks Control Act 2010.

e) The judgment is contrary to provision of the Criminal Procedure Code and provisions of the Evidence Act.

f) The sentence handed down was excessive in the circumstances of this case.

13. In the instant case when charge was read to the Appellant he replied that "***It is true.***" the court did not enter a plea of guilty as required but allowed the prosecution to give facts in support of the charge. The

facts given in the case did not disclose all the necessary ingredients of an offence of defilement . The trial court after facts were given entered a plea of guilty but did not convict the appellant with the offence of defilement as such but that notwithstanding the court sentenced the Appellant to serve 15 years imprisonment. I note the trial magistrate did not comply with the principles as set out in the **Adan V. Republic case (Supra)**. That apart from that the admission of facts as true which disclosed no offence cannot be a basis for conviction and sentencing of an accused person. That the Appellant replying and stating “**It is true**” without any other words in my view does not constitute an unequivocal plea of guilty. The accused can only be convicted on admission of facts constituent of the charge otherwise any admission of facts which do not disclose an offence cannot result into a lawful conviction.

14. The appellant was sentenced to serve 15 years imprisonment notwithstanding the fact that the age of the victim was not disclosed, and assailant was not identified. It is difficult to know on what basis the trial court decided to sentence the Appellant to serve 15 years when it is well known that in defilement cases the charging section and the sentence therein is based on the age of the victim and not on whims of the trial magistrate. The sentence in view of the above is not properly founded on law and is not in my view a sound sentence.

15. The State Counsel concedes the appeal on the grounds that the facts did not disclose the offence of defilement and it is not clear on what basis the trial court based its sentence. I find that the Learned State Counsel properly conceded the appeal.

16. Whether I should order a retrial? The Learned State Counsel conceded the appeal but did not root for a retrial. In the case of **Bernard Lelimo Ekimat V R CRA No. 51 of 2014 (unreported)** it stated what is required for ordering a retrial. The principle which should guide the court on that issue were set out thus:-

“The principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of the case but an order for retrial should be made where interests of justice requires it.”

17. The Court of Appeal amplified further the principles in the **Ekimat case (supra)** by enumerating some specific considerations, which a court should take into account in deciding whether a retrial should be ordered. Those considerations include a determination:-

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.

In view of the submission by State Counsel that witnesses may not be traced and conviction may not result form a retrial. I find no basis of ordering a retrial. I will therefore decline to order a retrial.

18. The upshot is that the appeal is allowed. The conviction is quashed and sentence set aside. The Appellant is set at liberty forthwith unless otherwise lawfully held.

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

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of: for Appellant.

M/s. Mourine for State.

C.C. 1. Kevin Odhiambo.

2. Mohammed Akideh.

J. A. MAKAU

JUDGE