



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

HCRA NO. 3 OF 2016

EMMANUEL ODHIAMBO Alias IMBENE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence by Hon. H. N. Ndungu

Chief Magistrate in Criminal SOA No. 100 of 2014)

J U D G M E N T

1. The Appellant, Emmanuel Odhiambo alias Imbene is currently serving a 15 year jail term for the offence of defilement contrary to section 8(4) of the Sexual Offences Act No. 3 of 2006. The Appellant being dissatisfied with the conviction has preferred this appeal.

2. In the particulars of the charge it was alleged that on 21st September, 2013 at [Particulars withheld] Sub-Location of Butula District within Busia County the Appellant intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of E A O a child aged 15 years.

3. In his petition of appeal dated 12th January, 2016 the Appellant raises six grounds of appeal as follows:

“1. That I pleaded guilty to the appended charges.

2. That I pleaded guilty out of coercion, intimidation and threats to my personal being.

3. That the trial court erred in law and facts by inviting me to a fresh plea which I called for upon invitation on promise of speedy expediting of the trial in another court.

4. That the trial court erred in law and facts by basing her conviction on my guilty plea, the foregoing and my state of mind notwithstanding.

5. That I was under duress, stress and my psychological judgment was overtaken by impulse reach which led to my plea.

6. That my constitutional right to a fair trial were grossly violated, infringed, denied and threatened rendering the entire trial a mistrial, unfair and thus void.”

4. A brief history of the Appellant’s trial is necessary. He first appeared in Court on 6th October, 2014 where he pleaded not guilty and the case subsequently proceeded to trial with four prosecution witnesses

testifying. After the four witnesses had testified, the Magistrate (M. Munyekenye, SRM) who had been handling the matter was transferred.

5. On 11th June, 2015, the succeeding Magistrate, C. I. Agutu, RM duly complied with Section 200 of the Criminal Procedure Code, Cap. 75. The Appellant opted to have the matter start *denovo*. The matter was then fixed for hearing on 10th September, 2015.

6. When the matter came up for hearing on 10th September, 2015 the prosecutor notified the Court that the Appellant had not understood the meaning of Section 200 of the Criminal Procedure Code, Cap. 75. The Appellant thereafter addressed the Court and indicated that his case should proceed from where it had stopped. The Magistrate directed that the matter proceeds from where it had reached before the previous Magistrate and fixed the matter for further hearing on 12th November, 2015.

7. The matter came up for mention on 8th October, 2015 and the Appellant requested that the charges be read to him afresh. After the charges were read over to him in Kiswahili the Court record goes as follows:

“Accused – Ni ukweli

Court – Accused person will be taken for a mental assessment test.

Court – Mention on 22nd October 2015.”

8. On 22nd October, 2015 there was no mention by the Magistrate about the Appellant’s plea and the requested mental assessment report. On that day it was noted that the typed proceedings were ready and the matter fixed for hearing on 12th November, 2015. The matter once again came up for mention before C. I. Agutu, RM on 4th November, 2015 and again there was no mention of the plea of guilty and the mental assessment report.

9. On 12th November, 2015 the matter was put off on the ground that the trial Magistrate was away on official duty. J. N. Maragia, RM who mentioned the matter then fixed the matter for hearing on 7th January, 2016. The matter was to be mentioned on 26th November, 2015. However, the matter instead came up for mention before H. N. Ndungu, CM on 27th November, 2015. After the Magistrate had mentioned the matter and signed off, the Appellant requested that the Court refreshes his memory as to the charge.

10. The charge was read to the Appellant once again in Kiswahili and he pleaded guilty. The prosecutor indicated that he did not have his file. The reading of facts was put off to 1st December, 2015.

11. On 1st December, 2015 the matter was placed before M. A. Nanzushi, SRM but the prosecutor did not have the file and the matter was put off to 2nd December, 2015 for mention for facts.

12. On 2nd December, 2015 the matter was placed before H. N. Ndungu, CM and the facts were read out to the Appellant who indicated that the facts were correct. He was convicted and the matter put off to 8th December, 2015 for sentencing.

13. On 8th December, 2015 the prosecutor informed the Court that the victim was 16 years at the time of the alleged offence. In passing sentence the Magistrate took note of this fact and indicated that the Appellant ought to have been charged under Section 8(4) instead of Section 8(3) of the Sexual Offences Act, 2006. She then exercised her power under Section 179(2) of the Criminal Procedure Code, Cap. 75 and convicted the Appellant for defilement contrary to Section 8(4) which carries a lesser penalty.

14. In his written submissions, which he opted to rely on when his appeal came up for hearing, the

Appellant submitted that he pleaded guilty to the charges after a long court process and hostile remand conditions.

15. It is the Appellant's case that those circumstances plus torture and intimidation took a toll on his mental judgment leading to his plea of guilty.

16. The Appellant faults the trial Court for not warning him of the consequences of entering a plea of guilty considering the harsh sentence that awaited him.

17. It is the Appellant's case that the fact of his mental disorientation was indeed noted by the Court which ordered for a mental assessment but the results of the exercise were never divulged to the Court.

18. The Appellant submits that his fellow inmates coerced him into pleading guilty promising that such a plea would expedite the trial process.

19. On alleged breach of his constitutional rights, the Appellant contends that he was disturbed when a new Magistrate took over the matter and asked him to elect whether he wanted the matter to start afresh or continue from where it was left by previous Magistrate. This, according to him, breached his right to an expeditious trial.

20. The Appellant also alleges that Article 50 of the Constitution was breached as he was not provided with the documents which the prosecution intended to rely on during his trial.

21. The State opposed the appeal stating that the Appellant was convicted upon his own plea of guilty. It is the State's case that the Appellant is the one who asked the Court to read over the charges to him afresh.

22. According to the State, the Appellant did not raise any issues about his mental state and although the result of the mental assessment ordered by the Court is not on record, the Court must have observed that he was fit to respond to the charges. Further, that there is no evidence that the Appellant pleaded under duress.

23. On the alleged breach of the Appellant's constitutional rights, the State asserts that there is no particularization of the said breach. Further, that any breach of constitutional rights cannot vitiate a criminal trial and the Appellant's remedy, if any, lies elsewhere.

24. In the circumstances of this case, the question that needs to be addressed is whether the plea was unequivocal.

25. It is not clear why the Court (C. I. Agutu, RM) asked for a mental assessment test when the Appellant pleaded guilty on 8th October, 2015. The Court cannot speculate on what was in the mind of the Magistrate. Sometimes judicial officers forget that court records are not meant for their consumption alone. They are also very crucial for the appellate courts.

26. The Appellant has relied on this order to claim that he was not fit to take plea at the time he was convicted upon his own plea of guilt. Section 11 of the Penal Code, Cap. 63 provides that:

“Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”

27. It is upon an accused person to demonstrate to the Court his unsoundness of mind where he intends to rely on the same as a defence. However, the Court is also under a duty to ensure that those that it tries are of sound mind. That is why Section 161(1) of the Criminal Procedure Code, Cap. 75 requires the Court to enquire into the fact of unsoundness of mind of an accused person where it has reason to believe that the accused is of unsound mind and consequently incapable of making his defence.

28. Even though the Court asked for a mental assessment test, it never pursued this issue when the matter came up for mention twice before the same Magistrate thereafter.

29. Subsequently, the matter thereafter passed through the hands of two other magistrates (J. N. Maragia, RM and M. A. Nanzushi, SRM) before ending up with the convicting Magistrate. They never made any observations about the Appellant's state of mind.

30. The matter also appeared before the convicting Magistrate (H. N. Ndungu, CM) several times before she finally convicted and sentenced the Appellant on his own plea of guilty.

31. More important is the fact that M. Munyekenye, SRM heard four witnesses on different days and never raised any query about the state of the Appellant's mind. To be exact, the matter was before this particular Magistrate eleven times. After the transfer of this Magistrate, the Appellant asked for the matter to start *denovo* but later asked the Court to proceed from where the matter had been left by the previous Magistrate.

32. The proceedings before M. Munyekenye, SRM can therefore be referred to by this Court as the Appellant had changed his earlier decision to have the matter start afresh. A perusal of the court record clearly shows that the Appellant cross-examined the witnesses who testified. No bizarre behavior was noted by the Magistrate.

33. Everything points to the fact that the Appellant was of sound mind at the time he pleaded guilty to the charge of defilement. There is also no evidence that he suffered from unsoundness of mind at the time he committed the offence. Maybe as a matter of precaution, the courts should in future adopt the suggestion of S. N. Mutuku, J in **Mohamed Sonar Noor v Republic [2013] eKLR** where she observed that:

“It is unfortunate that other than the practice in murder trials, the accused persons are not automatically examined to determine their mental status before the plea is taken. It is my view that every accused person, especially those facing serious offences, must as of right be subjected to medical check-up in regard to their mental status before a plea is taken. This would not be asking for too much given the guarantees, inter alia, to rights to a fair trial in our Constitution”.

In the said case the learned Judge proceeded to quash the conviction and set aside the sentence of the Applicant on the ground that there was medical evidence that he was of unsound mind at the time he took plea.

34. In the case before me, there is no medical evidence on the Appellant's state of mind at the time he took plea, and there is nothing from the Court record to show that he may have been of unsound mind.

35. I also do not find any evidence to show that the Appellant was coerced and intimidated by the prison authorities or the Court into changing plea. He is the one who moved the Court, not once but twice, to read the charges to him. That cannot be said to coercion. Accused persons often change plea and magistrates have a duty to enter plea of guilty and proceed to convict and sentence them. That cannot be said to be coercion or intimidation.

36. The remand conditions could not surely have propelled the Appellant into changing plea for the offence he was pleading to attract a minimum custodial sentence. He therefore knew or ought to have known that his plea of guilty would result in imprisonment.

37. From what I have said, it therefore follows that the Appellant's 2nd to 5th grounds of appeal fail.

38. On the alleged breach of constitutional rights the Appellant has not particularized the right allegedly violated. He has not explained in what manner those rights were violated.

39. In his written submissions he alleged that he was not provided by the prosecution with the evidence to

be used in his trial. The record shows otherwise. On 18th June, 2014 the Appellant requested for copies of the documentary exhibits and informed the Court that he already had copies of the witness statements. In any case, the Appellant was convicted on his own plea of guilty and he cannot now turn around and claim that he was not given the evidence.

40. In view of what I have stated above, I find that this appeal has no merit. The same is therefore dismissed.

Dated, signed and delivered at Busia this 18th day of August, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT