



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 49 OF 2014

(An appeal from the Orders of the Resident Magistrate, Siakago in SPMCR. Case No. 805 of 2014)

NZEKI KITUKU..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

J U D G M E N T

This is an appeal against the orders of Siakago Resident Magistrate in Criminal Case No. 805 of 2014. The appellant was charged with defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act. The alternative charge was of indecent act with a child contrary to Section 11(1) of the same Act. The appellant pleaded guilty to the alternative charge and was sentenced to life imprisonment.

The petition of appeal consisted of the following grounds:-

1. *That he did not understand the language of the court.*
2. *That the appellant did not understand the nature of the offence and the consequences thereon.*
3. *That the magistrate failed to consider that he did not have a fair trial.*
4. *That the investigating officer coerced him to plead guilty to the offence.*
5. *That the magistrate failed to consider the nature of the offence and the facts adduced by the prosecution before sentencing him.*

The court record shows that the appellant was arraigned in court on the 11/8/2014 when the charge was read to him and he requested for a Kamba interpreter. The interpreter who was in court at the material time was one Mr. Njagi. The court adjourned and ordered that the executive officer procure a Kamba interpreter.

When the court resumed later in the day, the Kamba interpreter namely Mr. Kiilu was present. The charge and every element was read to the appellant and interpreted in Kikamba language. In answer to the main charge the appellant replied “*I tried but it refused. I was playing with her*”. The magistrate entered a plea of not guilty to the main charge.

The alternative charge was read to the appellant and interpreted in Kikamba language and he replied “it is

true". The prosecutor was not ready with the facts on that day because he did not have the P3 form. He requested the court to give him upto 13/8/2014 to present the facts of the case.

On 13/8/2014 the appellant was not produced in court. A production order was issued for 20/8/2014 when the appellant appeared in court. The prosecutor read the facts of the case to the court which were interpreted by one Sylvia. The appellant replied "*the facts are correct and it is true, I am not denying*". The magistrate convicted the appellant on his own plea of guilty.

On perusal of the court record, it is clear that the court on request of the appellant provided a Kamba interpreter. The plea was read to him in Kikamba which was the language of his choice. From the words he used in response to the charge, it leaves no doubt that he understood the charge and the facts well. Section 281 only deals very briefly with the matter where an accused person pleads guilty. It simply says that the plea is to be recorded and the accused maybe convicted thereon. The practice adopted in taking pleas is that after the accused has pleaded guilty, the prosecutor outlines the facts of the alleged offence. The court must ask the accused whether he understands the facts and whether they are correct. It is until he gives an answer in the affirmative that the court will record it in the words he uses and then convict him.

The principles to be followed in taking plea were set out in the case of **ADAN VS REPUBLIC [1973] EA 445** where it was held:-

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;

The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

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;

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;

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.

The facts of the case were read and explained to the appellant by the court and his reply which was quite detailed demonstrates clear understanding of the facts. The relevant facts can be briefly stated:-

"The complainant was aged 7 years....He caught hold of the minor and dragged her for about 300 metres from the homestead towards the bush and started touching her private parts and later undressed her removing her trouser and under pants and inserted his penis into her vagina".

It is clear from the proceedings that the prosecutor did not produce medical evidence to support the charge of defilement. He only told the court that "*the minor was taken to Kiritiri Health Centre where it was confirmed that she was defiled because there was penetration*". It is trite law that penetration can only be proved through medical evidence which was not availed to the court. In the absence of medical evidence, the court should not convict an accused person of the charge of defilement. The record is clear that the appellant pleaded guilty to the alternative charge of committing an indecent act with a child. It was a misdirection on the part of the magistrate to convict the appellant with the offence of defilement without medical evidence. The facts presented to the court constitute the offence of an indecent act with a child.

In mitigation the appellant demonstrates further that he understood the proceedings when he said:-

"I did not know that what I did was wrong. Sometimes one becomes crazy. I pray for pardon".

The claim that the appellant did not understand the language used by the court and that he was not given a fair trial was dislodged by the proceedings of the court which recorded each and every word he said in response to the charge and in his confirmation that the facts were correct.

It was alleged that the appellant was coerced to admit the charge by the investigating officer. When he appeared in court for the first time, the appellant did not raise any complaint of that nature. The appellant had ample time to change his plea if there was a problem. This was the right time for him to tell the court that he had either been assaulted or threatened in the police cells or shortly before he was arraigned in court. It is important to note that the facts were not taken on the first day the appellant was arraigned in court because the prosecutor was not ready. The prosecutor gave the facts twelve days after the plea was taken. It is also the practice for the magistrate taking plea observes the state of the accused. If any unusual situation is observed, the court is bound to enquire into it and put it on record. There is nothing on record to show that the appellant had been harassed or beaten while in the police cells.

It is my finding that the trial magistrate took the plea in accordance with the principles laid down in the case of *ADAN VS REPUBLIC (supra)*. The plea was therefore unequivocal. The only error that the magistrate committed was to convict on the wrong offence when it was very clear in the court record that the appellant had pleaded guilty to the offence of indecent act with a child. The offence was sufficiently supported by the facts which were admitted by the appellant. The facts constitute the offence of indecent act with a child contrary to Section 11(1) of the Act.

For the foregoing reasons, the court quashes the conviction on the offence of defilement and substitutes it with a conviction of the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

The sentence provided for the offence under Section 11(1) of the Act is imprisonment for 10 years to run from the time of conviction. The sentence of life imprisonment imposed by the trial magistrate is hereby set aside. The appellant is sentenced to serve ten (10) years imprisonment for the offence of indecent act with a child.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF SEPTEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Nandwa for the State

Appellant